

SUPPLEMENT TO THE REPORTS OF WILLIAM H. PURCELL

**TRUSTEES OF THE MAFCO LITIGATION TRUST V. RONALD PERELMAN, ET AL
CIVIL ACTION NO. 97-586 (RRM) (SLR)
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE**

April 9, 2002

I, William H. Purcell, hereby submit this supplement to my expert reports dated March 15 and March 29, 2002.

INTRODUCTION

1. I submitted an expert report dated March 15, 2002 in the above-referenced case (the "Purcell Expert Report"). In the Purcell Expert Report, I discussed certain restrictions relating to Marvel Entertainment Group, Inc. ("Marvel") in the Indentures for three Marvel Holding Company note issues: an issue by Marvel Holdings Inc. sold in April 1993 (the "Holdings Issue"); an issue by Marvel (Parent) Holdings Inc. sold in October 1993 (the "Parent Issue"); and an issue by Marvel III Holdings Inc. sold in February 1994 (the "Marvel III Issue"). I explained that in my opinion these restrictions were a substantial reason why the issuers could sell such notes to investors. I also stated that the existence of the Holding Company debt with restrictions relating to Marvel significantly limited Marvel's financing flexibility and options.
2. I submitted a rebuttal expert report in the above-referenced case on March 29, 2002 (the "Purcell Rebuttal Report"). The Purcell Rebuttal Report stated my disagreement with the opinion of plaintiffs' expert, Professor Robert W. Holthausen.
3. Subsequent to the preparation of my Reports, I was provided with a copy of the transcript of the deposition of Howard Gittis, the Vice Chairman and Chief Administrative Officer of MacAndrews & Forbes Holdings, which took place on March 25, 2002, and the exhibits marked and discussed at that deposition. I am

submitting this supplement to take into account information from the testimony and exhibits at the deposition of Mr. Gittis.

4. My qualifications as an investment banker and as an expert in corporate debt financing are set forth in the Purcell Expert Report, pages 1-2 and Exhibit 1 thereof.

SUPPLEMENTAL OPINIONS

5. It is my opinion, based on my business experience and knowledge, and the testimony of Mr. Gittis, that the restrictions relating to Marvel in the Holding Company Indentures caused actual financial injury and damage to Marvel in the fourth quarter of 1996 in the amount of not less than \$470,825,000.
6. The basis for my opinion is set forth below.
7. It is my understanding based on, for example, the deposition of Mr. Gittis, that Marvel desperately needed liquidity and financial flexibility as of November 1996, and that a major capital infusion was necessary for Marvel's financial restructuring and ability to survive and to have the opportunity to thrive over time.
8. One of the restrictions on Marvel in the Holding Company indentures was section 4.09. That section is entitled "Majority Ownership; Limitation on Liens." It provides, *inter alia*, that each Holding Company "shall at all times from and after the Final Collateral Date be the legal and beneficial owner of a majority of the Voting Stock of Marvel."
9. Mr. Gittis testified with reference to section 4.09 of the Holding Company Indentures, "no one would put the kind of money necessary to restructure Marvel

up without owning a majority of the shares free of these bond offerings; so you had to amend that provision." (Gittis Tr. at 13).

10. The deposition of Mr. Gittis shows that even Andrews Group Incorporated (which I understand was 100% owned by one of Mr. Perelman's holding companies) was unwilling to make a significant equity investment in Marvel in November 1996 unless the restrictions in the Holding Company Indentures could be amended.
11. Prior to Marvel's bankruptcy petition in late December 1996, Marvel had 101.8 million common shares outstanding. On the day prior to the November 12, 1996 Andrews Group proposal, Marvel's common shares, which publicly traded on the New York Stock Exchange, closed at a price of \$4.625 per share.
12. Based on my review of Mr. Gittis's testimony and the exhibits referenced therein, it is my opinion that the restrictions relating to Marvel in the Holding Company Indentures caused actual financial harm and damage to Marvel in the amount of at least \$470,825,000.


William H. Purcell
WILLIAM H. PURCELL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RONALD CANTOR, IVAN SNYDER and
JAMES A. SCARPONE, AS TRUSTEES OF
THE MAFCO LITIGATION TRUST,

Plaintiffs,

§ No. 97-CIV-586-KAJ

-against-

RONALD O. PERELMAN,
MAFCO HOLDINGS, INC.,
MacANDREWS & FORBES HOLDINGS INC.,
ANDREWS GROUP INCORPORATED,
WILLIAM C. BEVINS and
DONALD G. DRAPKIN,

Defendants.

REBUTTAL REPORT OF JUSTICE JOSEPH T. WALSH, RETIRED
Expert Witness for Plaintiffs Ronald Cantor, Ivan Snyder and James A. Scarpone, as
Trustees of The MAFCO Litigation Trust

Date: March 1, 2006

QUALIFICATIONS OF EXPERT WITNESS

1. I am currently Of Counsel to the law firm of McCarter & English, LLP of Wilmington, Delaware. Prior to my present employment, I was a member of the Delaware Judiciary for more than thirty years. I was appointed as a judge of the Delaware Superior Court in 1972. In 1984, I was appointed as a Vice Chancellor of the Delaware Court of Chancery. I was appointed as a Justice of the Delaware Supreme Court in 1985. I was then reappointed as a justice for a second twelve-year term in 1997. I retired from the Delaware Supreme Court effective May 1, 2003 and on June 1, 2003 joined McCarter & English. My curriculum vitae, including a list of certain publications and opinions I have authored while serving on the Delaware Court of Chancery and the Delaware Supreme Court is attached hereto as Exhibit 1.

2. Since joining McCarter & English, I have served as an arbitrator and mediator and have provided counsel and served as an expert witness in corporate litigation.

3. I have been retained by the firm of Friedman Kaplan Seiler & Adelman LLP to provide consulting services and advice in connection with that firm's representation of the plaintiffs in the above captioned matter. My compensation is on a fixed hourly rate of \$510 and is not dependent on the outcome of these proceedings. In this report I have been requested to comment on the Expert Report submitted by Professor Lawrence A. Hamermesh on behalf of the Defendants. In so doing, I opine, as did Professor Hamermesh, on the nature and extent of the fiduciary principles underlying the rights and duties of the defendants as controlling shareholder and directors of Marvel Entertainment Group, Inc. ("Marvel"), under Delaware law, in connection with the issuance of certain Notes issued by the so-called "Marvel Holding Companies" i.e., Marvel III Holdings, Inc. ("Marvel III"), Marvel (Parent) Holdings, Inc. ("Marvel Parent") and Marvel Holdings, Inc. ("Marvel Holdings").

4. The facts assumed by me for the purpose of this report are drawn primarily from the decision of the Third Circuit Court of Appeals, dated July 12, 2005, reversing in part, and affirming in part, the District Court's grant of summary judgment in favor of the defendants and remanding the matter for further proceedings in the trial court. I attach as Exhibit 2 a list of the materials considered by me.

5. Defendant, Ronald O. Perelman ("Perelman"), was at all relevant times a director of Marvel and Chairman of its board. Through a chain of wholly-owned companies, Perelman exercised controlling interest of 60% to 80% of Marvel's stock. Defendants William C. Bevins ("Bevins") and Donald G. Drapkin ("Drapkin") were common directors and officers of Marvel and Perelman's controlling holding companies. Perelman, Bevins and Drapkin constituted three of the four members of the Executive Committee of the Marvel board.

6. In 1993 and 1994, the defendants arranged for the issuance by the Marvel Holding Companies of a series of Notes. The three tranches of Notes yielded \$553.5 million. None of the proceeds of these Notes benefited Marvel, although the Notes contained certain restrictions applicable to Marvel. Specifically the Note Indentures provide that the issuers will not permit Marvel to issue debt, preferred stock, pay dividends or engage in stock buybacks, except under certain circumstances. The restrictions also provide that the issuers will prohibit Marvel's issuance of common stock that would dilute Marvel's control by Perelman. Marvel's senior management participated in "road shows" to support the marketing of the Notes.

7. The offering memoranda for each Note recited that "MacAndrews & Forbes will be able to direct and control the policies of the Issuer and its subsidiaries [*i.e.*, Marvel], including mergers, sales of assets and similar transactions." The memoranda further stated that "no vote

[would] be cast, and no consent, waiver or ratification given or action taken [by the Issuer], which would be inconsistent with or violate any provision of the Indenture or the Notes."

8. Subsequent to the issuance of the Notes, Marvel experienced liquidity problems and on December 27, 1996 filed a voluntary petition for bankruptcy. Plaintiffs allege that Marvel suffered financial harm as a result of being subject to the Note restrictions imposed solely for Perelman's benefit. The Third Circuit has ruled that, if the evidence showed at trial that defendants breached their duty of loyalty under Delaware law through exploitation of their fiduciary position for personal gain, plaintiffs should be afforded the opportunity to establish *inter alia*, "what the defendants would have had to pay Marvel, after arm's length bargaining, for the restrictions defendants secured without compensation." *Cantor v. Perelman* 414 F.3d 430 at 437.

9. Professor Hamermesh states that a controlling shareholder is "entitled to take extraordinary steps to protect that [controlling] interest against efforts by the board of directors to issue sufficient shares to eliminate that majority voting power." A controlling shareholder, however, especially a controlling shareholder who is also a director still owes fiduciary duties to the corporation and cannot breach those duties in order to maintain his controlling position. Any assessment of the defendants' responsibility to Marvel (and other constituencies affected by their conduct) must begin with the defendants' duties as directors of a corporation chartered under Delaware law. Directors of a Delaware corporation "have a triad of primary fiduciary duties: due care, loyalty, and good faith." *Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001). The duty of loyalty, implicated here, has been described in the seminal decision of the Delaware Court of Chancery, *Guth v. Loft*, 5 A.2d 503, 510 (Del. Ch. 1939) as one "not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing

anything that would work injury to the corporation....” Where directors stand on both sides of a transaction the specter of self-dealing is omnipresent and this danger is heightened where one of the parties to the transaction is a controlling shareholder of both entities. *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

10. In *Weinberger* the court emphasized that dual directors, who were appointed by the parent to the subsidiary’s board, “still owed ... an uncompromising duty of loyalty” to the subsidiary and its shareholders. *Weinberger*, 457 A.2d at 710.

Given the absence of any attempt to structure this transaction on an arm’s length basis, [the parent] cannot escape the effects of the conflicts it faced, particularly when its designees on [the subsidiary’s] board did not totally abstain from participation in the matter. There is no ‘safe harbor’ for such divided loyalties in Delaware. ...

There is no dilution of this obligation where one holds dual or multiple directorships, as in a parent-subsidiary context. [Citation omitted.] Thus, individuals who act in a dual capacity as directors of two corporations, one of whom is parent and the other subsidiary, owe the same duty of good management to both corporations....

Id. at 710 . The court also held that “where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.” *Id.* at 710.

11. Where a transaction carries the potential for self-dealing by a controlling shareholder, Delaware law recognizes that a “safe harbor” may be established through the formation of a special committee of independent directors. *Kahn v. Lynch Communication Sys.*, 638 A.2d 1110, 1117 (Del. 1994). The special committee mechanism has served to relieve the proponents of the transaction of the burden of proving the fairness of a business transaction provided the special committee “was truly independent, fully informed, and had the freedom to negotiate at arm’s length.” *Lynch* at 1020-21. When the special committee had real bargaining

power so that it could negotiate with the controlling shareholders the burden may be shifted to a shareholder attacking the fairness of the transaction.

12. In subjecting Marvel to the restrictions set forth in the Notes, Perelman and his aligned directors failed to discharge their fiduciary duty of loyalty owed to Marvel and Marvel's minority shareholders. At a minimum, the defendants should have provided for the use of a special committee of independent directors to engage in arm's length bargaining with Perelman over the terms of any commitment made by Perelman as Marvel's controlling shareholder to restrict Marvel's ability to raise capital. In proceeding to impose such restrictions unilaterally, the defendants breached the duty of loyalty which requires that the "best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993).

13. The principles underlying the obligation to demonstrate fairness in the context of parent-subsidiary mergers provide analogous support for the view that whenever a controlling shareholder crafts a transaction which impacts both controlled entities, he must ensure that the interests of one are not made subservient to the interests of another. "Delaware law is unyielding in its demand that directors owing duties to two constituencies uphold those duties, without compromise, to both groups; or if they cannot, they must relinquish that duty to another." *Gans v. MDR Liquidating Corp.*, 1998 WL 294006 (Del. Ch. 1998) at *3. As noted, the defendants made no effort to relinquish their duty in favor of a special committee and thus were clearly conflicted to the extent that the terms of the Notes carried the risk of financial detriment to Marvel. Indeed, not only did the defendants abjure the use of a special committee mechanism,

they required Marvel's employees directly to engage in activities in road shows to promote the marketing of the Notes.

14. Professor Hamermesh has concluded that a shareholder having majority or controlling voting power (presumably Perelman) possesses a valuable control premium which the shareholder is entitled to protect from efforts to reduce such control; including preventing corporate board of directors from adopting any measure to dilute or reduce such control. Professor Hamermesh has also concluded that under Delaware law as "generally recognized in the 1993-1996 time period ... directors cannot, consistent with their obligations as directors, seek to eliminate a majority stockholder's control through the issuance of shares, in the absence of some circumstance in which such an issuance would be necessary to protect the corporation and its stockholders from exploitation or breach of fiduciary duty by the majority stockholder." Professor Hamermesh opines that the restrictive provisions of the Indentures simply reflect limitations already permitted by Delaware law and did not "in any significant way, if at all" prevent Marvel and its board of directors from issuing other equity securities, short of deleting Perelman's control.

15. I do not disagree that the majority stock ownership is a valuable property right and enjoys recognition as a control premium. I also agree that a majority shareholder – in his capacity as a shareholder but not as a director – is entitled to protect that interest from efforts to eliminate or reduce it. But that right is not absolute. For example, the Court of Chancery noted in *Mendel v. Carroll*, 651 A.2d 297, 306 (Del. Ch. 1994), "a situation might arise in which a board could, consistently with its fiduciary duties, issue a dilutive option in order to protect the corporation or its minority shareholders from exploitation by a controlling shareholder who was in the process or threatening to violate his fiduciary duties to the corporation...."

16. I disagree, moreover, with Professor Hamermesh's implication that it is only in the face of the need to protect the corporation and its shareholders from exploitation or breach of fiduciary duty by a majority shareholder that directors can effect a dilution of majority control. As Chancellor Seitz noted in *Canada Southern Oils, Ltd. v. Manabi Exploration Co.*, 96 A.2d 810 (Del. Ch. 1953), cited by Professor Hamermesh, the test is a contextual one. If the corporation's "long range financial prospects" are not in jeopardy and the "primary purpose" of the issuance of additional shares was to deprive the controlling share of voting control, the dilution effort would not be permissible. Where, however, directors are motivated not by an intention to dilute control but by the desire to protect the interests of the corporation and its minority shareholders, they could properly cause the issuance of additional equity even if that issuance had the effect of diluting majority control. It is an abuse of power for a board of directors to issue stock "for the sole or primary purpose of diluting the voting power of an existing block of stock" but not for the principal purpose of raising necessary or desirable capital. *Freedman v. Restaurant Associates Indus., Inc.*, 1987 WL 14323 *9 (Del. Ch. Oct. 16, 1987).

17. Of course, one cannot opine with any assurance what options the independent directors of Marvel might have pursued to protect the interests of Marvel and its minority shareholders from the Indenture Restrictions. Not only was the use of a special committee of independent directors not explored as a protective measure to insure arm's-length bargaining, the implications of the Indenture restrictions on Marvel's interests apparently were never presented to the Marvel Board. Even though Perelman and his aligned directors were fully cognizant of the undertakings they had made applicable to Marvel through the Indenture Restrictions, they did not present the matter to the Marvel Board.

18. Finally, it should be noted that any action by the Marvel board to issue additional shares of common stock would have been an act permitted under the Delaware General Corporation Law. While that action might serve to reduce or dilute the controlling shareholder's interests, the action of the Board, if adopted for a proper corporate purpose, would be analyzed under the well-settled Delaware Corporate Law principle of independent legal significance. Under this doctrine, if an action can be accomplished under one section of the DGCL it need not satisfy the requirements of another section which permits the same result. *Orzeck v. Englehart*, 195 A.2d 375, 378 (1963); *Rothschild Intern. Corp. v. Liggett Group Inc.*, 474 A.2d 133, 136 (Del. 1984); *Moran v. Household International, Inc.*, 490 A.2d 1059, 1077 (Del. Ch. 1985), aff'd. 500 A.2d 1346 (1985). In my opinion, if the issuance of additional equity were for the purpose of advancing or protecting the financial viability of the company, and that result was the primary motivation for the Board's action, that action would be independently defensible, notwithstanding its dilutive effect on Perelman's interest.



Joseph T. Walsh

Exhibit 1

Exhibit 1**Justice Joseph T. Walsh**

Justice Joseph T. Walsh is a native Delawarean who served as a member of the Delaware Judiciary from 1972 to his retirement in 2003. He is an honors graduate of LaSalle University and Georgetown University Law Center where he was a member of the law review. He was admitted to the District of Columbia Bar in 1954 and to the Delaware Bar in 1955 and served as law clerk to Chief Judge Paul Leahy of the United States District Court for Delaware. He served three years on active duty as a member of the Judge Advocate General Corps of the United States Army. He engaged in the private practice of law for fourteen years, primarily as a litigator including service as Chief Counsel for the Delaware Public Service Commission. He also served as attorney for the Delaware House of Representatives and counsel for the Wilmington Parking Authority.

Justice Walsh was appointed as a judge of the Superior Court in 1972, a Vice Chancellor of the Court of Chancery in 1984 and as a Justice of the Delaware Supreme Court in 1985. He was reappointed as a justice to a twelve year term in 1997. Justice Walsh retired from the Delaware Supreme Court in April, 2003. He joined McCarter & English as Of Counsel June 1, 2003. As a former director of Einstein Institute for Science, Health and the Courts, Justice Walsh authored articles and lectured on the legal implications of genetic science. He is an adjunct professor at the Widener University School of Law from which he received an honorary Doctor of Laws degree in 1997.

While a member of the Delaware Judiciary, Justice Walsh chaired various committees including the Criminal Code Commentary Committee, the Long Range Court's Planning Committee, the Administrative Office of the Courts Restructuring Committee, and was a member of the New Castle County Courthouse Construction Committee. In 1989, Justice Walsh received the Herbert Harley Award from the American Judicature Society for promoting the effective administration of justice. In 2002, Justice Walsh received the First State Distinguished Service Award the highest award conferred by the Delaware State Bar Association and the 2002 Chief Justice's Annual Award for Outstanding Judicial Service. On July 3, 2003, Delaware Governor Ruth Ann Minner awarded Justice Walsh the Order of the First State, the highest state government honor. During his service on the Supreme Court, he authored more than 300 opinions in areas of civil, criminal and corporate law.

While a member of the Superior Court and the Court of Chancery, Justice Walsh participated in settlement negotiations in a variety of cases involving personal injury claims and business disputes. He has completed the forty hour course in Mediation for Judges conducted by the American Bar Association Dispute Resolution Section Judicial Division and The National Judicial College.

Justice Walsh's publications include the following:

"Courts and Science: The Challenge and Burden of Technology." *Courts Health Science & The Law*, October, 1990, Vol. 1, No. 2.

"The First Amendment and the Promise of Religious Freedom." *Delaware Lawyer*, Winter, 1991, Vol. 9, No. 4.

"Some Observations on a Changing Profession." *Delaware Lawyer*, Winter, 1994, Vol. 12, No. 4.

"Courts and the Challenges of Adjudicating Genetic Testing's Secrets" (with Franklin M. Zweig and Daniel M. Freeman). *Genetic Secrets*, edited by Professor Mark A. Rothstein, University of Houston Law School, 1996.

"Judiciary Article IV." *The Delaware Constitution of 1897, The First One Hundred Years*, edited by Harvey Bernard Rubenstein, Delaware State Bar Association, 1997.

"The Evolving Standards of Admissibility of Scientific Evidence." *Judges' Journal*, Summer 1997, Vol. 36, No. 3 and *Best of ABA Sections*, Spring 1998, Vol. 2, No. 1.

"Judicial Independence: A Delaware Perspective." *Delaware Law Review*, 1999, Vol. 2, No. 1.

"Keeping the Gate: The Evolving Role of the Judiciary in Admitting Scientific Evidence." *Judicature*, November-December 1999, Vol. 83, No. 3.

"The Fiduciary Foundation of Corporate Law." *The Journal of Corporation Law*, The University of Iowa College of Law, Spring, 2002, Vol. 27, No. 3.

"The New Castle County Courthouse." *Delaware Lawyer*, Winter 2002-2003, Vol. 20, No. 4.

"The Evolving Role of State Constitutional Law in Death Penalty Adjudication." *NYU Annual Survey of American Law, Judges' Forum* No. 3, 2003, Vol. 59, Issue 2.

"The Limits of Proportionality Review in Death Penalty Cases." *Delaware Lawyer*, Winter 2003-2004, Vol. 21, No. 4

Corporate Opinions Authored by Justice Joseph T. Walsh**Court of Chancery**

Gilbert v. El Paso Company
490 A.2d 1050 (1984)

Mesa Partners v. Phillips Petroleum Company
488 A.2d 107 (1984)

Moran v. Household International, Inc.
490 A.2d 1059 (1985)
Affirmed 500 A.2d 1346 (1985)

MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc.
501 A.2d 1239 (1985)
Affirmed 505 A.2d 454 (1985) (w/opinion to issue)
Opinion 506 A.2d 173 (1986)

Supreme Court

1. Georges Marciano, et al v. Joe Nakash, et al.
535 A.2d 400 (1987)
2. Bernard Kaplan, et al v. Peat, Marwick, Mitchell & Co., et al.
540 A.2d 726 (1988)
3. Anadarko Petroleum Corporation, et al. v. Panhandle Eastern Corp., et al.
545 A.2d 1171 (1988)
4. Louise Simons v. Marshall S. Cogan, et al.
549 A.2d 300 (1988)
5. Blinder, Robinson & Co., Inc. v. Donald L. Bruton Securities
Commissioner of the State of Delaware
552 A.2d 466 (1989)
6. Tandycrafts, Inc., et al. v. Initio Partners
562 A.2d 1162 (1989)
7. Cavalier Oil Corporation v. William J. Harnett
564 A.2d 1137 (1989)

8. Leonard Barkan v. Amsted Industries, et al. and Enid Mindich, et al.
567 A.2d 1279 (1989)
9. Centaur Partners, IV v. National Intergroup, Inc., et al.
582 A.2d 923 (1990)
10. Ruth Kahn v. Household Acquisition Corporation and Household Finance Corporation
591 A.2d 166 (1991)
11. Charles M. Oberly, III, Attorney General of the State of Delaware, Allan P. Kirby, Jr., et al. v. Fred M. Kirby, et al.
592 A.2d 445 (1991)
12. In the Matter of the Appraisal of Shell Oil Company
607 A.2d 1213 (1992)
13. Stanley Heineman v. Datapoint Corporation, et al.
611 A.2d 950 (1992)
14. Marilyn Zirn v. VLI Corporation, et al.
621 A.2d 773 (1993)
15. City Investing Company Liquidating Trust v. Continental Casualty Co.
624 A.2d 1191 (1993)
16. ATA A. Farahpour v. DCX, Inc.
635 A.2d 894 (1994)
17. Jeffrey Prezant, et al. v. Joseph DeAngelis, et al.
636 A.2d 915 (1994)
18. Alabama By-Products Corporation and Drummond Company, Inc. v. CEDE & Co. acting on behalf of Shearson Lehman Brothers, Inc., et al.
657 A.2d 254 (1995)
19. Karen Shaw and Forrest Foster v. Agri-Mark, Inc.
663 A.2d 464 (1995)
20. Howard S. Klotz v. Warner Communications, Inc. and Time Warner
674 A.2d 878 (1995)

21. Alan R. Kahn v. Lynch Communication Systems, Inc., et al.
669 A.2d 79 (1995)
22. Merle Thorpe, Jr. by the Executor of his estate, Peter M. Castleman, and Foundation for Middle East Peace v. CERBCO, Inc., et al.
676 A.2d 436 (1996)
23. United States Cellular Investment Company of Allentown v. Bell Atlantic Mobile Systems, Inc., et al.
677 A.2d 497 (1996)
24. Alan Kahn, derivately on behalf of DEKALB Genetics Corp. v. Charles C. Roberts, et al.
679 A.2d 460 (1996)
25. Alan Russell Kahn v. Tremont Corporation, et al.
694 A.2d 422 (1997)
26. Laurel Gonsalves v. Straight Arrow Publishers, Inc.
701 A.2d 357 (1997)
27. SBC Interactive, Inc. v. Corporate Media Partners, et al.
714 A.2d 758 (1998)
28. Emerald Partners v. Ronald P. Berlin, et al.
726 A.2d 1215 (1999)
29. Waterside Partners v. C. Brewer and Company, Ltd., et al.
739 A.2d 768 (1999)
30. Leonard Loventhal Account v. Hilton Hotels Corp.
780 A.2d 245 (2001)
31. John A. Gentile v. Singlepoint Financial, Inc.
PER CURIAM
788 A.2d 111 (2001)
32. Cameron McNeil and Justin McNeil v. Henry Slack McNeil, Jr., et al
798 A.2d 503 (2002)
33. Telxon Corporation v. Robert Meyerson, et al.
802 A.2d 257 (2002)
34. Stifel Financial Corporation v. Robert M. Cochran
809 A.2d 555 (2002)

35. Tyson Foods, Inc. and Lasso Acquisition Corp. v. Altos Corp., et al. and Baric Mappa, et al. and IAP, Inc.
809 A.2d 575 (2002)
36. Tyson Foods, Inc. and Lasso Acquisition Corp. v. Altos Corp., Pelican Limited Partnership, et al. and Baruch Mappa, Michael Taragin, et al. and IBP, Inc.
818 A.2d 145 (2003)

Exhibit 2

Exhibit 2
Materials Considered

- Marvel Entertainment Group, Inc. Form 10-K for the Fiscal Year Ended December 31, 1993
- Marvel Entertainment Group, Inc. Form 10-K for the Fiscal Year Ended December 31, 1994
- Marvel Entertainment Group, Inc. Form 10-K for the Fiscal Year Ended December 31, 1995
- Marvel Entertainment Group, Inc. Form 10-Q for the Quarterly Period Ended March 31, 1993
- Marvel Entertainment Group, Inc. Form 10-Q for the Quarterly Period Ended June 30, 1993
- Marvel Entertainment Group, Inc. Form 10-Q for the Quarterly Period Ended September 30, 1993
- Marvel Entertainment Group, Inc. Form 10-Q for the Quarterly Period Ended March 31, 1994
- Marvel Entertainment Group, Inc. Form 10-Q for the Quarterly Period Ended June 30, 1994
- Marvel Entertainment Group, Inc. Form 10-Q for the Quarterly Period Ended September 30, 1994
- Marvel Entertainment Group, Inc. Form 10-Q for the Quarterly Period Ended March 31, 1995
- Marvel Entertainment Group, Inc. Form 10-Q for the Quarterly Period Ended June 30, 1995
- Marvel Entertainment Group, Inc. Form 10-Q for the Quarterly Period Ended September 30, 1995
- Marvel Entertainment Group, Inc. Form 10-Q for the Quarterly Period Ended March 31, 1996
- Marvel Entertainment Group, Inc. Form 10-Q for the Quarterly Period Ended June 30, 1996
- Marvel Entertainment Group, Inc. Form 10-Q for the Quarterly Period Ended September 30, 1996
- Marvel Entertainment Group, Inc. Form S-3 Registration Statement Debt Securities Prospectus Marvel Entertainment Group, Inc., March 14, 1995
- Tender Offer Statement, Amendment No. 1, April 16, 1993
- Form S-1 Registration Statement for the public offering of Notes on July 2, 1993
- Marvel III Holdings Inc. Form S-1, March 31, 1994

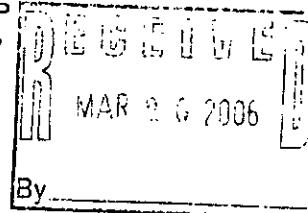
- Marvel Entertainment Group, Inc. Form 8-K, November 20, 1996
- Marvel Holdings Inc. Indenture, April 15, 1993
- Marvel (Parent) Holdings Inc. Indenture, October 1, 1993
- Marvel III Holdings Inc. Indenture, February 15, 1994
- Marvel Holdings Inc. Offering Memorandum, April 16, 1993
- Marvel (Parent) Holdings Inc. Prospectus, October 13, 1993
- Marvel III Holdings Inc. Offering Memorandum, February 8, 1994
- Marvel Board minutes, March 18, 1993, March 9, 1994, December 12, 1996 and December 26, 1996
- Outline for Howard Gittis Presentation to Marvel's Banks, November 19, 1996
- Transcript of Deposition of William C. Bevins, March 7, 2002
- *Cantor, et al. v. Perelman, et al.*, Court of Appeals Docket Index Nos. 04-1790 & 04-2896, Brief of Plaintiffs-Appellants and Volume 1 of Joint Appendix
- *Cantor, et al. v. Perelman, et al.*, Court of Appeals Docket Index Nos. 04-1790 & 04-2896, Brief for Appellees
- *Cantor, et al. v. Perelman, et al.*, Court of Appeals Docket Index Nos. 04-1790 & 04-2896, Reply Brief of Plaintiffs-Appellants
- *Cantor, et al. v. Perelman, et al.*, 414 F.3d 430 (3d Cir. 2005)
- Expert Report of Bevis Longstreth, January 12, 2006
- Expert Report of Andrew S. Carron, January 13, 2006
- Report of Jeffrey L. Balaban, January 13, 2006
- Expert Report of Lawrence A. Hamermesh, January 13, 2006

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 BARBARA J. GRAVES

March 15, 2006

BY EMAIL AND REGULAR MAIL

Paul J. Lockwood, Esq.
 Skadden, Arps, Slate, Meagher & Flom LLP
 One Rodney Square
 P.O. Box 636
 Wilmington, Delaware 19899

Re: Cantor, et al. v. Perelman, et al.

Dear Paul:

As you know, this firm represents the plaintiffs in the above-referenced matter. I write to advise you of the following with respect to the Rebuttal Report of Justice Joseph T. Walsh, Retired, dated March 1, 2006. First, Justice Walsh's curriculum vitae lists all publications he authored within the last ten years. Second, we have been advised by Justice Walsh that he has provided testimony as an expert by deposition within the last four years in the following cases: *Genesis Insurance Co. v. FTD.COM, Inc.*, Civil Action No. 03 C 4444 (N.D. Ill.); *John W. Enger v. John E. Richards, et al.*, No. 02-2-14778-O SEA (Wa. Super. Ct., King County); and *William Robertson, et al. v. Princeton University, et al.*, Docket No. C-99-02 (N.J. Super. Ct. Ch. Div., Mercer County). Please give me a call if you have any questions.

Sincerely,

Emily A. Stubbs

Page 1

1
2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE DISTRICT OF DELAWARE
4

5 RONALD CANTOR, IVAN) No. 97-586-KAJ
6 SNYDER and JAMES A.)
7 SCARPONE, as TRUSTEES OF)
8 THE MAFCO LITIGATION, and)
9 as Successors in Interest)
10 to the Marvel)
11 Entertainment Group,)
12 Inc., et al.,)
13)
14)
15)
16)
17 Plaintiffs,)
18)
19)
20 vs.)
21)
22 RONALD O. PERELMAN, et)
23 al.,)
24)
25 Defendants.)
-----)

14
15
16
17 VIDEOTAPED DEPOSITION OF JEFFREY L. BALIBAN
18 New York, New York
19 Tuesday, April 11, 2006
20
21
22
23

24 Reported by:
25 PENNY SHERMAN
25 JOB NO. 183397

<p style="text-align: right;">Page 66</p> <p>1 Baliban 2 Q. Did you give consideration to that 3 approach? 4 A. It is not too different from the 5 approach that we actually did use, in that it takes 6 a value of the stock and says the loss is -- the 7 loss of that value, subsequent to information and 8 certain announcements coming out. And that's not 9 too different from the event study that we did. I 10 don't know the details of Mr. Purcell's actual 11 calculations. 12 I am familiar with the event study that 13 we performed, the regressions that we performed, 14 the analysis of the statistical significance of the 15 variables that we identified in order to support 16 the conclusion that we reached. So, I mean, in 17 essence, he's saying we had a value of \$4.62 or 63 18 cents a share and then we didn't. So, he 19 attributes that -- the loss of that value to these 20 issues. And in a large way, I do the same. 21 Q. Well, you come to a significantly lower 22 number that's attributed to the harm; isn't that 23 right? 24 A. I don't think so. I come to a number 25 that ranges from 300- to 600 million. He comes to</p>	<p style="text-align: right;">Page 68</p> <p>1 Baliban 2 that is the process that I followed in performing 3 my event study. I defined my event window as 4 information becoming known in November and really 5 very narrowly thereafter. 6 And it is not unusual for a person 7 performing an event study to attempt to narrow the 8 event window as much as possible to increase the 9 likelihood that your -- that the results are 10 statistically significant and are appropriately 11 being assigned to the specific circumstances. And 12 so that's my process. 13 I don't know Mr. Purcell's process, and 14 all I can read here are his results, but I haven't 15 studied his process or his thinking. His results 16 are generally similar to mine. 17 Q. Let's take a look at your report again. 18 In general terms, your report focuses on covenants 19 in the terms of three note offerings from 1993 and 20 1994; is that right? 21 A. I think that that's correct. In 22 general, though, it really deals with the second 23 and third note offerings. 24 Q. The subject in your report is the 25 October 1993 Marvel Parent offering and the</p>
<p style="text-align: right;">Page 67</p> <p>1 Baliban 2 a number that's 400 million or so. 3 Q. I'm focusing on your event study 4 analysis of the November 12, 1996 harm. Setting 5 aside Mr. Purcell's report, did you give 6 consideration to an analysis that was based on 7 taking a \$4.63 price and comparing it to the 8 eventual cancellation of the shares years later at 9 zero and measuring that delta as the damages 10 figure? 11 A. I was trying to do something very much 12 more proximate in the specific time of the 13 announcements being made, and that was the basis of 14 the regressions that we did. I did not expand my 15 event study to include other eventualities that may 16 have occurred in '97 or '98 or whenever those -- 17 these were zeroed out, as you said. I don't even 18 know exactly when that occurred. 19 Q. And why was it that you chose to do 20 something that was much more specific in time 21 related to the announcement? 22 A. It is my process to apply appropriate 23 methodologies to a specifically identified 24 occurrence and measure the impact of that within 25 the constraints of an event window. And that's --</p>	<p style="text-align: right;">Page 69</p> <p>1 Baliban 2 February 1994 Marvel III offering; Is that correct? 3 A. Yes. 4 Q. And why is it that you did not consider 5 the Marvel Holdings offering, which was the first 6 one? 7 A. I think I state in paragraph 3 -- 8 Q. Footnote 7? 9 A. -- footnote 7, why that is. 10 Q. And is that because plaintiffs' counsel 11 advised you, the claim for compensatory damages 12 with respect to the Holdings notes had been barred 13 by the statute of limitations? 14 A. Yes. 15 Q. So that was just an assumption that you 16 applied as an expert in this case? 17 You didn't look at that offering in 18 terms of damages; is that correct? 19 MR. GOLDWATER: Could you repeat the 20 question again? 21 (The question was read.) 22 MR. GOLDWATER: That's two questions. 23 I'm not sure which one you want him to deal 24 with. 25 MR. LOCKWOOD: I think it's the same</p>

Page 1

1

2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE DISTRICT OF DELAWARE

4

5 RONALD CANTOR, IVAN) No. 97-586-KAJ
6 SNYDER and JAMES A.)
7 SCARPONE, as TRUSTEES OF)
8 THE MAFCO LITIGATION, and)
9 as Successors in Interest)
10 to the Marvel)
11 Entertainment Group,)
12 Inc., et al.,)
13)
14)
15)
16)
17 RONALD O. PERELMAN, et)
18 al.,)
19)
20)
21)
22)
23)
24 Reported by:
25 PENNY SHERMAN
26 JOB NO. 183399

<p style="text-align: right;">Page 158</p> <p>1 indentures. And the person who accepted them is 2 with the board and management of Marvel. 3 Q. Okay. 4 A. And that acceptance was what you and I 5 have been sparring about. 6 Q. Just chatting. 7 A. Yeah, chatting. 8 Q. Okay. But you know of no document, 9 piece of paper, video -- 10 A. No. Well, wait. I'm sorry, finish your 11 question. 12 Q. Let me finish the question. You know of 13 no document, piece of paper, contract, video, 14 electronic recording, any other physical thing 15 which evidences the acceptance of these 16 restrictions by the Marvel board, correct? 17 A. No. 18 Q. Incorrect? 19 A. Incorrect. 20 Q. Okay. What's the piece of paper by 21 which Marvel accepted these -- 22 A. All the SEC filings I've been referring 23 to. 24 Q. Oh, okay. Pull them out, let me see</p>	<p style="text-align: right;">Page 160</p> <p>1 controlling shareholder agreed to impose upon it. 2 Q. But you didn't see anything that said 3 Marvel accepts the restrictions? 4 A. Not those precise words. We're talking 5 about agreement by behavior, by a course of 6 conduct. That's what you litigators call it. 7 Q. Now, the third paragraph to your answer 8 to these two questions, near the end -- 9 A. Third paragraph. 10 Q. Yeah. Second to last sentence, it says, 11 These advisors. By that, you're referring to 12 independent counsel -- 13 A. Yeah. 14 Q. -- and bankers who you would have 15 retained for your independent committee to 16 negotiate over the acceptance of these 17 restrictions, right? 18 A. Right. 19 Q. These advisors would serve Marvel 20 through its independent directors in determining 21 what kind of benefit, if any, in what size, would 22 constitute a reasonable, and to the independent 23 directors, acceptable quid pro quo for allowing the 24 restrictions to be imposed.</p>
<p style="text-align: right;">Page 159</p> <p>1 where it says Marvel accepted the restrictions, 2 those words. 3 A. No, there are no words. 4 Q. Okay. 5 A. If you're talking about precise words, 6 those words are not there. 7 Q. Mr. Longstreth, I'm talking about your 8 precise words. Did you see any piece of paper, any 9 audio, visual recording, anything else in the 10 record that said, in your words, that Marvel had 11 accepted any restrictions in the notes; you didn't 12 see that? 13 MR. FRIEDMAN: Objection. Asked and 14 answered. 15 A. I'm saying that the behavior of the 16 management of Marvel and the board of Marvel, 17 together with various filings, fairly construed in 18 the totality, evidence, a corporate acceptance of 19 these covenants. And I've said that in many 20 different ways, but that's what I am saying. 21 And I believe that any fair reading of 22 the totality of the record would lead, you know, a 23 reasonably careful thinking person to conclude that 24 this company accepted the covenants that its</p>	<p style="text-align: right;">Page 161</p> <p>1 My question -- I just want to make sure 2 you have no expert opinion on what the appropriate 3 quid pro quo for Marvel's acceptance of these 4 restrictions would have been, correct? 5 A. Correct. No expert opinion you said? 6 Q. Right. That's how you testified. You 7 don't know anything as a matter of fact. You 8 weren't aware of all of this as it was happening, 9 right? 10 A. Well, it didn't happen. 11 Q. No, no. I'm asking, you had no actual 12 knowledge of these events before you were retained 13 as an expert in this case? 14 A. Oh, no. 15 MR. CLARK: Off the record. 16 THE VIDEOGRAPHER: The time is 2:12 17 p.m., April 13, 2006. This concludes Tape 18 Number 2 of the videotaped deposition of 19 Mr. Bevis Longstreth. 20 (A recess was taken.) 21 THE VIDEOGRAPHER: The time is 2:19 p.m. 22 April 13, 2006. This marks the beginning of 23 Tape Number 3 of the videotaped deposition of 24 Mr. Bevis Longstreth.</p>

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RONALD CANTOR, IVAN SNYDER and JAMES
A. SCARPONE, as TRUSTEES OF THE MAFCO
LITIGATION and Successors in Interest
to the Marvel Entertainment Group,
Inc., et al.,

Plaintiffs,

vs.

97-CIV-586-KAJ

RONALD O. PERELMAN, et al.,

Defendant.

DEPOSITION OF BEVIS LONGSTRETH

New York, New York

Wednesday, May 24, 2006

Reported by:

Adrienne M. Mignano

JOB NO. 184644

1 **Longstreth**
 2 and had access to my computer, wrenching it
 3 away from my wife.
 4 Q. Did you use the notes that you had
 5 prepared on the plane in drafting your
 6 report?

7 A. I did.

8 Q. Did you look at any documents in
 9 preparing your second report other than
 10 Mr. Fowler's report?

11 A. No. Well, other than my own
 12 report, my original report.

13 Q. So you looked at your original
 14 report?

15 A. I did.

16 Q. And you looked at Mr. Fowler's
 17 report; is that right?

18 A. Yes.

19 Q. There is in your original report a
 20 set of materials considered. Are you
 21 familiar with that portion of your report?

22 A. Right.

23 Q. Did you go back and look at any of
 24 those materials that you had previously
 25 looked at?

Page 10

1 **Longstreth**

2 A. No.

3 Q. There is in Mr. Fowler's report an
 4 exhibit entitled "Materials Considered" that
 5 lists the documents that he looked at.

6 Are you familiar with that portion
 7 of his report?

8 A. I read his report from cover to
 9 cover.

10 Q. And he has an exhibit to his report
 11 that has a set of the documents he
 12 considered, correct?

13 A. Right.

14 Q. Did you go and look at the
 15 documents that he considered?

16 A. No.

17 Q. The report that you provided first
 18 time out, in preparing that report, you
 19 didn't rely on any other expert's opinion; is
 20 that correct?

21 A. Rely on any other expert's opinion?

22 Q. In reaching your own opinion.

23 A. No, I don't think so.

24 Q. And there is a double negative, so
 25 that means you didn't?

Page 11

1 **Longstreth**
 2 A. I did not.
 3 Q. And in your second report in which
 4 you looked at your original report and
 5 Mr. Fowler's report, I take it then that you
 6 didn't rely on or incorporate any other
 7 expert's opinion into this second report?

8 A. No.

9 Q. Have you read any of the other
 10 expert reports?

11 A. Yes.

12 Q. Which ones have you read?

13 A. Well, I read the one -- I think I
 14 have read them all, but I don't remember all
 15 of them at the moment.

16 Q. Did you read any other expert
 17 reports besides Mr. Fowler's and your own
 18 before writing your second report?

19 A. No, that's the third time you have
 20 asked me that. I guess I'm trying to give
 21 you the same answer each time.

22 Q. I appreciate that.

23 The plaintiffs have offered some
 24 other experts. I'll just give you their
 25 names to try to help you in remembering the

Page 12

1 **Longstreth**

2 reports.

3 One of their experts is a
 4 Mr. Baliban. Are you familiar with
 5 Mr. Baliban's report?

6 A. I looked at it; I read it.

7 Q. Did you read that carefully and
 8 scrutinize that report?

9 A. I gave it as much care as I thought
 10 I needed to give it.

11 Q. And since you didn't rely on it,
 12 how much care did you need to give it?

13 A. Well, what in my judgment seems
 14 sufficient.

15 Q. Did you give it a quick read or did
 16 you read it slowly cover to cover; do you
 17 remember?

18 A. I don't remember.

19 Q. What about Mr. Carron's report, he
 20 is another expert that the plaintiffs have
 21 engaged?

22 A. I remember reading that too about
 23 the same way.

24 Q. So meaning that you don't remember
 25 how you read it?

Page 13

1 Longstreth
 2 **A. Yes.**
 3 Q. And in the second sentence of
 4 Mr. Fowler's report he says, "In providing
 5 that rebuttal, I have been asked to assume
 6 that the indenture restrictions bound Marvel
 7 and to determine how much the Marvel holding
 8 companies would have had to pay Marvel after
 9 arm's length bargaining at the time of the
 10 issuance of the holding company notes to
 11 compensate Marvel for these restrictions."

12 Is that the issue that you were
 13 responding to in your report?

14 **A. Yes.**

15 **Well, I'm responding to the -- I'm
 16 not responding to that question so much as
 17 I'm responding to the hypothetical arm's
 18 length bargaining that Mr. Fowler inserted in
 19 his report.**

20 To answer this question, he didn't
 21 need to do that, but he did choose to do it.
 22 And having done it, it raises questions as to
 23 the realism of what he was doing. And it
 24 reveals the basis on which he arrived
 25 ultimately at an answer to this question.

Page 18

1 Longstreth
 2 **And I think that I was requested to address
 3 the realism of what he depicted as an arm's
 4 length negotiation.**

5 Q. If you go to the exhibits that were
 6 previously marked at your deposition in
 7 April.

8 **A. Up here?**

9 Q. Yes.

10 I'd like you to take a look at
 11 Exhibit 1, which is your original expert
 12 report.

13 **A. Okay.**

14 Q. And I would like to draw you to
 15 page 2 of that report.

16 **A. Yes.**

17 Q. There is a block quote at the top
 18 of the page under the heading "Opinion".

19 Do you see that?

20 **A. Yes.**

21 Q. It begins, "We wish to obtain your
 22 expert opinion" --

23 **A. Right.**

24 Q. -- "with respect to the nature of
 25 arm's length bargaining that would have been

Page 19

1 Longstreth
 2 conducted by Marvel with Perelman if Perelman
 3 had presented to the independent directors of
 4 Marvel a request that Marvel assist and
 5 acquiesced in the note transactions as it
 6 did."

7 My question is: How is your
 8 rebuttal report different in the issue that
 9 it analyzes from your initial report and the
 10 question that you analyzed in that initial
 11 report?

12 **A. Well, in the initial report, I
 13 focused on the, really, almost exclusively on
 14 the second sentence, and then very
 15 specifically on the answers to the questions
 16 that were put to me in a letter, I think.**

17 Q. There is a letter from Mr. Friedman
 18 that's Exhibit C to your initial report.

19 **A. Yeah.**

20 Q. Is that what you're referring to?

21 **A. Yeah, I'm trying to find the
 22 questions. There were specific questions.
 23 And you can see I -- my report starts with
 24 the answer to question one.**

25 Q. There are seven questions listed on

Page 20

1 Longstreth
 2 pages five and six of Exhibit C to your
 3 initial report.

4 Is that what you're referring to?

5 **A. I'm fumbling around here because --**

6 Q. You're going beyond the -- it's
 7 confusing because you have all the exhibits
 8 there. Stay within the first.

9 **A. Okay.**

10 **That's right. Those are the
 11 questions.**

12 Q. If you go to the previous page,
 13 page 4 of Mr. Friedman's letter.

14 **A. Okay.**

15 Q. "Questions To Be Addressed". Do
 16 you see that heading?

17 **A. Yes.**

18 Q. And his overarching question to
 19 you, at least as I read this letter, is set
 20 forth in the topic sentence of that
 21 paragraph. "We wish to obtain your expert
 22 opinion with respect to the nature of the
 23 arm's length bargaining that would have been
 24 conducted by Marvel with Perelman if Perelman
 25 had presented to the independent directors of

Page 21

1 Longstreth
 2 Marvel a request that Marvel assist and
 3 acquiesce in the note transactions as it
 4 did."

5 Did you address that?

6 A. Well, that's the same paragraph as
 7 I quoted in my answer.

8 Q. And did your initial report, did it
 9 address that question posed by the first
 10 sentence of the paragraph quoted on page 2 of
 11 your report?

12 A. It really did not. It addressed
 13 the second general question in that
 14 paragraph, and then moved immediately to
 15 answer the specific questions.

16 Q. Does your rebuttal report, does it
 17 respond to this first question that's posed
 18 in the paragraph on page 2 of your report?

19 MR. FRIEDMAN: I object to the
 20 form of the question.

21 A. Well, it responds to what Ed
 22 Friedman asked me to do, which was to
 23 consider the Fowler hypothetical negotiation
 24 and comment on the -- on how close to a real
 25 negotiation it came.

Page 22

1 Longstreth

2 Q. If you could, I'm going to ask you
 3 to look at two things at once. Page two of
 4 your initial report and that block quote.

5 A. Right.

6 Q. And that first sentence there and
 7 Exhibit 7, Mr. Fowler's report.

8 A. Page 7?

9 Q. Page 2 of Fowler's report,
 10 paragraph 5.

11 A. I got it, yeah.

12 Oh, wait a minute.

13 Q. The second sentence.

14 A. Page 5 did you say?

15 Q. Paragraph 5.

16 A. I got it.

17 Q. The second sentence of paragraph 5
 18 where he discusses what he was asked to do.
 19 And I want you to compare the issue
 20 identified in the first sentence of the block
 21 quote in your first report and that sentence
 22 in the second sentence of paragraph 5 of
 23 Mr. Fowler's report, and just tell me if, to
 24 your understanding, there is a meaningful
 25 difference between the issues described in

Page 23

1 Longstreth
 2 those two sentences?
 3 MR. FRIEDMAN: I object to the
 4 form of the question.

5 A. If there is a meaningful
 6 difference?

7 Q. Well, I'll be up front with you.
 8 As I read the first sentence in the block
 9 quote in your paragraph that begins "we wish
 10 to obtain your expert opinion" --

11 A. Yes.

12 Q. -- I look at that, and I look at
 13 Mr. Fowler's report paragraph 5, the sentence
 14 that begins "In providing that rebuttal, I
 15 have been asked to assume" -- and it goes on
 16 from there.

17 I read those two sentences as
 18 essentially addressing the same subject
 19 matter.

20 Do you read them that way as well?

21 A. No.

22 Q. Why not?

23 A. Well, Mr. Fowler's -- in the
 24 assignment given to Mr. Fowler, there is a
 25 simple question being asked, which is how

Page 24

1 Longstreth
 2 much Marvel holding would have to pay Marvel.
 3 In an arm's length negotiation, what would
 4 they pay? And that's the question. That is
 5 not the question here.

6 In this paragraph, which is much,
 7 much broader, I'm being asked to give an
 8 opinion on the nature of the arm's length
 9 bargaining that would have occurred.

10 I took that paragraph frankly to
 11 not be asking me to package a negotiation,
 12 but rather to ask me to consider the --
 13 really relying on the second sentence, "What
 14 are the considerations that an independent
 15 director would take into account in
 16 considering this note issuance?"

17 In other words, in its broadest
 18 context, and I never answered the first
 19 question directly. I answered the questions
 20 that were put to me. That's how I went about
 21 this. And I set out a bunch of
 22 considerations that I thought a director who
 23 was truly independent would have to think
 24 about, including, of course, whether there is
 25 going to be any negotiation at all. That

Page 25

<p>1 Longstreth 2 you would want financial advice as to how to 3 approach that negotiation; is that correct? 4 A. Yes, I would want professional 5 help. 6 Q. And in your initial report, you go 7 on to say, "These advisors would serve Marvel 8 through its independent directors in 9 determining what kind of benefit, if any, and 10 what size could constitute a reasonable and 11 to the independent directors acceptable quid 12 pro quo for allowing the restrictions to be 13 imposed. I would ask the advisors to develop 14 as many alternative ways of benefitting 15 Marvel adequately as possible."</p> <p>16 That was your view in your initial 17 report as to how the directors should 18 approach the bargaining; is that correct?</p> <p>19 MR. FRIEDMAN: That's part of 20 what the report says. What's the 21 question?</p> <p>22 Q. I'm confirming that was your view 23 in your initial report, correct?</p> <p>24 A. Yes.</p> <p>25 Q. And in your rebuttal report, before</p>	<p>1 Longstreth 2 Q. In terms of the work an investment 3 banker would do in analyzing potential or 4 financial structures of a financing 5 transaction, is that something that you would 6 consider yourself expert in?</p> <p>7 A. Yes. I mean, my experience has 8 been over a long period of time doing 9 financial transactions and giving advice with 10 them. And as you know, legal advice and 11 business advice and financial advice tend to 12 blur and overlap each other. So I think the 13 answer to your question is yes.</p> <p>14 Q. Well, when you were saying that the 15 board should go out and get expert financial 16 advisors --</p> <p>17 A. Right.</p> <p>18 Q. -- do you think that you would be a 19 suitable candidate for the board to hire?</p> <p>20 A. No. I mean, I didn't have myself 21 in mind. I was thinking of someone that is 22 a -- is not providing the legal input, but is 23 providing the financial analysis and input.</p> <p>24 Q. You have read --</p> <p>25 A. In other words, it could be a</p>
---	---

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Page 32

<p>1 Longstreth 2 you gave your rebuttal report, did you 3 consult with any financial or legal experts 4 in order to analyze or flesh out how the 5 bargaining with Mr. Perelman would have 6 proceeded?</p> <p>7 A. No.</p> <p>8 Q. You are a lawyer; is that correct?</p> <p>9 A. I don't practice any more.</p> <p>10 Q. At one time you were a lawyer?</p> <p>11 A. I was at one time. Technically, I 12 still am a member of the bar.</p> <p>13 Q. You have never been an investment 14 banker; is that correct?</p> <p>15 A. Never been an investment banker.</p> <p>16 Q. And you never held yourself out as 17 an expert financial advisor?</p> <p>18 A. That's not correct.</p> <p>19 Q. You have held yourself out as a 20 professional financial advisor?</p> <p>21 A. I do right now.</p> <p>22 Q. In connection with providing 23 financial advice for companies --</p> <p>24 A. No, in connection with the 25 management of money.</p>	<p>1 Longstreth 2 commercial banker, investment banker.</p> <p>3 Q. You have read Mr. Fowler's CV 4 that's attached to his report; is that right?</p> <p>5 A. I have.</p> <p>6 Q. And is Mr. Fowler someone who has 7 the expertise and background that you think 8 would meet minimum qualifications for a board 9 to engage as a financial advisor in a 10 negotiation such as this?</p> <p>11 A. I don't remember his 12 qualifications.</p> <p>13 Q. Well, why don't you take a look at 14 them. It's an exhibit to his report. 15 Exhibit 2.</p> <p>16 A. Exhibit 2?</p> <p>17 Q. To his report, which is Exhibit 7.</p> <p>18 A. I'm looking at -- when he did all 19 this advising, where was it?</p> <p>20 Q. Credit Suisse, First Boston.</p> <p>21 A. Yes, well, he has got the kind of 22 experience I'm talking about.</p> <p>23 But he would have to be -- to 24 qualify, he would have to be completely 25 independent and undividedly loyal to the</p>
--	--

Page 31

Page 33

1 Longstreth
 2 shall if you do this or if this happens. If
 3 the event tax deconsolidation event happens,
 4 then we, the holders, are entitled to a put.
 5 Now, the practical effect of the
 6 two is the same because if -- I mean, if the
 7 noteholders choose to put the notes, the
 8 holding companies don't have the wherewithal
 9 to pay it except -- because they don't have
 10 any assets except the stock in Marvel. So it
 11 would rapidly, unless somebody came to the
 12 rescue, it would rapidly -- the put would
 13 rapidly lead to an event of default.

14 Q. Why don't you take a look at
 15 Mr. Fowler's report, which is Exhibit 6. And
 16 I want to draw your attention to paragraph
 17 32.

18 A. 32?

19 Q. Yes.

20 MR. FRIEDMAN: Fowler report, I
 21 think is Exhibit 7.

22 MR. LOCKWOOD: You're right.

23 MR. FRIEDMAN: Paragraph 32.

24 Q. I'll give you a moment just to read
 25 paragraph 32 instead of reading it aloud.

1 Longstreth
 2 to such opinions at trial.
 3 And I want the record to be clear
 4 that my view is you are going way
 5 beyond the opinions previously
 6 expressed.

7 MR. LOCKWOOD: I won't argue with
 8 you here. I completely disagree, but
 9 I won't argue with you here.

10 Q. The analysis that's in paragraph 31
 11 and 32 that I just drew to your attention,
 12 did you make any assessment of Mr. Fowler's
 13 views that a protection similar to the
 14 restrictions could be obtained by formatting
 15 them as puts?

16 A. I didn't credit it with -- I didn't
 17 give it much weight, let's put it that way.
 18 I was looking at what actually happened, not
 19 other things that -- other ways of
 20 restructuring the transaction to possibly
 21 accomplish the same kinds of processes that
 22 the noteholders were seeking through what
 23 they actually got. I didn't address -- I
 24 didn't spend much time thinking about that.
 25 I did think that the -- any analogy to a

Page 54

Page 56

1 Longstreth
 2 Just let me know when you're done.
 3 In fact, while I'm having you do
 4 some reading, why don't you start by reading
 5 the last two sentences of the previous
 6 paragraph as well.

7 A. Right. You mean 31?

8 Q. Yes.

9 A. The last how many?

10 Q. You can start --

11 A. A put option.

12 Q. Both, however the restrictions --

13 A. Yes.

14 MR. FRIEDMAN: Let me interject
 15 before you ask a question, that I
 16 believe you have been asking questions
 17 that go beyond the opinions expressed
 18 by the witness in his rebuttal report,
 19 and I believe questions you're asking
 20 go beyond the opinions the witness
 21 expressed in his initial report, and
 22 to the extent that you open the door
 23 and the witness expresses further
 24 opinions, then we reserve and will
 25 assert all of our rights with respect

1 Longstreth
 2 margin loan was completely wrong.

3 Q. Well, in Mr. Fowler's construction
 4 of the hypothetical negotiations between
 5 Marvel --

6 MR. FRIEDMAN: What page are you
 7 referring to, if I may ask?

8 MR. LOCKWOOD: I'm referring to
 9 page 29, exchange 5.

10 A. Okay.

11 Q. His exchange is M -- and (a) from
 12 Marvel says, "MacAndrews & Forbes must pay
 13 Marvel for the restrictions in the notes",
 14 and one of Mr. Fowler's responses is that
 15 "MacAndrews & Forbes has other options, we
 16 could issue LYONS or use puts instead of a
 17 covenant package format."

18 Do you see that?

19 A. Yes.

20 Q. Did you, sir, do an analysis of
 21 whether MacAndrews & Forbes had such other
 22 options, such as using puts instead of
 23 covenants?

24 A. I thought about it. It wasn't very
 25 persuasive to me as a line of argument. I

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1 **Longstreth**
 2 think that if I were a director, or if I were
 3 in charge of the argument, I would say well,
 4 if that's the case, do what you can do
 5 without tampering with our business, but if
 6 you're going to tamper with our business, if
 7 that's the way you want to do this, then
 8 we're going to sit down and talk about what
 9 it is going to cost you.

10 Q. Well, can you explain to me, you
 11 said you didn't. You said you thought about
 12 it and "it wasn't very persuasive to me".

13 Can you describe for me the
 14 analysis you performed in making a judgment
 15 as to whether Mr. Fowler had correctly
 16 analyzed the put option, the option of using
 17 puts?

18 MR. FRIEDMAN: I object to the
 19 form of the question because you
 20 gave -- the witness gave you a
 21 complete answer and you read back a
 22 phrase from his prior answer. Why
 23 don't you read back the entire answer?
 24 You have his explanation and opinion
 25 at his prior answer.

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1 **Longstreth**
 2 A. It's in my report.
 3 Q. Can you show me where in your
 4 report?
 5 A. It's throughout my report.
 6 Q. Can you show me any specific point
 7 of your report where I can find it?
 8 MR. FRIEDMAN: I want the record
 9 to be clear that the witness has
 10 answered your questions on this
 11 subject matter as well.
 12 MR. LOCKWOOD: I'm just trying to
 13 avoid surprises.
 14 Q. If you can show me where in your
 15 report I can find this answer, I would
 16 appreciate that.
 17 A. It's on every page. I can't
 18 pinpoint it. As I've said repeatedly, the
 19 covenants were to transfer of the rights and
 20 responsibilities of the board to run the
 21 business at Marvel from that board to the
 22 indenture trustee and the noteholders,
 23 neither one of which had any fiduciary duty
 24 whatsoever to the stockholders, particularly
 25 the minority stockholders or Marvel itself.

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1 **Longstreth**
 2 Q. If you have no further analysis?
 3 A. I have nothing to add to that.
 4 Q. So there is nothing supporting your
 5 judgment beyond what you said in the previous
 6 answer; is that correct?
 7 MR. FRIEDMAN: I object to the
 8 form of the question.

9 A. My expert opinion and my rebuttal
 10 opinion support my judgment.

11 Q. What analysis did you perform, if
 12 any, with respect to the question of whether
 13 MacAndrews & Forbes had alternatives to the
 14 restricted covenants in its pursuit of a
 15 financing?

16 MR. FRIEDMAN: I object to the
 17 form of the question.

18 A. I considered all of this. I have
 19 nothing to add.

20 Q. I'm trying to understand your
 21 thinking, so that we can hear about it at
 22 trial and get an understanding of where
 23 you're coming from.

24 So what other than you considered
 25 it, can you tell me anything more?

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1 **Longstreth**
 2 That's the essence of the problem
 3 with these negative covenants. And that
 4 analysis could not be applied to either a put
 5 or a margin loan.

6 Q. Why don't you take a look at your
 7 rebuttal report, again.

8 Page 2. You have a sentence that
 9 provides "some specifics follow". And then
 10 below that there is some numbered paragraphs

11 A. Uh-huh.

12 Q. Are there any specifics omitted
 13 from your report?

14 A. I don't know.

15 Q. Sitting here today, do you know of
 16 any specifics that are missing from the
 17 report?

18 A. Well, each of these points could be
 19 elaborated at greater length, but there is
 20 nothing, I don't think there is anything that
 21 is coming out of left field, it has nothing
 22 to do with the points I'm making here.

23 Q. So there is no --

24 A. I would have to reserve the right
 25 to elaborate the paragraphs I have set out

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1 **Longstreth**
 2 here, particularly if I'm asked questions
 3 about it.

4 Q. That invites me to go through all
 5 the paragraphs, so why don't we do that.

6 As to the second paragraph of
 7 number one, the brief two sentence paragraph,
 8 it says, "As to benefits, the wealth
 9 extraction from Marvel accrued solely to the
 10 benefit of Ronald O. Perelman, nothing of
 11 benefit accrued to Marvel or its minority
 12 shareholders."

13 In your analysis, what was the
 14 amount of the benefit that Mr. Perelman
 15 obtained as a result of the restrictions?

16 A. The dollar amount?

17 Q. Yes.

18 A. I think it was something like 535.

19 Q. So in your view, the full amount of
 20 the proceeds of the note offerings is the
 21 amount of the benefit that Mr. Perelman
 22 obtained as a result of having these
 23 restrictions in place; is that correct?

24 A. Yes.

25 Q. And you are aware that Mr. Fowler's

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1 **Longstreth**
 2 is a Section 4, "Benefits to the
 3 Marvel Holding Companies of the
 4 Restrictions".

5 MR. FRIEDMAN: And that continues
 6 until page what, until page 27?

7 MR. LOCKWOOD: Yes. Pages 12 to
 8 26 are the benefits of his analysis.

9 A. 12 to 26?

10 Q. Yes, 14 pages of analysis on that
 11 point.

12 MR. FRIEDMAN: You want the
 13 witness to tell you if he agrees or
 14 disagrees with those 14, or rather 15
 15 pages?

16 MR. LOCKWOOD: Yes, I have two
 17 sentences in his expert report. I'm
 18 looking for anything beyond those two
 19 sentences that responds to those
 20 pages.

21 A. I have nothing to add.

22 Q. In the next section, I mean next
 23 paragraph, as to the costs, do you see that?

24 A. Yes.

25 Q. "The risk of the note issuance were

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1 Longstreth
 2 report, and I can show you where in his
 3 report he does an analysis of the amount of
 4 the benefit obtained by Mr. Perelman as a
 5 result of the restrictions.

6 Can you look at that portion of his
 7 report?

8 A. I looked at it.

9 Q. It's section 4 that begins on page
 10 12, and it goes on for several pages and has
 11 many subparts.

12 MR. FRIEDMAN: Is there something
 13 that you want the witness to read?

14 MR. LOCKWOOD: Well, I'm going to
 15 ask him a question right now.

16 Q. Do you have anything more specific
 17 in response to Mr. Fowler's several page
 18 analysis of the benefits to Mr. Perelman
 19 beyond the two sentences that I see here on
 20 page 2 of your rebuttal report?

21 MR. FRIEDMAN: When you refer to
 22 Mr. Fowler's analysis, which portion
 23 are you now referring to so the record
 24 is clear?

25 MR. LOCKWOOD: On page 12, there

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1 Longstreth
 2 borne by Marvel, whose assets were in
 3 practical effect the sole resource of
 4 repayment."

5 A. Source.

6 Q. "Source of repayment."

7 What do you mean by that?

8 A. The -- what I mean by that is that
 9 the proceeds of the notes flowed to Ronald
 10 Perelman, 100 percent. The obligations on
 11 the notes were incurred by holding, which had
 12 no assets other than the stock of Marvel. So
 13 the source of payment of both interest and
 14 principal on the notes was understood by the
 15 noteholders to be and expected to be solely
 16 the assets and business of Marvel. And if
 17 the payments were not forthcoming, or other
 18 agreements by the holding companies to the
 19 noteholders were violated, the sole recourse
 20 of the noteholders was to foreclose on the
 21 stock and take over control of Marvel, and
 22 find a way either through running the
 23 business successfully or liquidating it to
 24 obtain payment.

25 Q. Was it your understanding that the

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1 Longstreth
 2 investors in the notes were looking to the
 3 cash proceeds that Marvel would generate in
 4 its business as a source of repaying the
 5 notes?

6 **A. Yes. Yes, that the profit making**
7 potential of Marvel, or the value of its
8 assets, one or the other or both. They held
9 80 percent of the residual value of Marvel as
10 security for payment on the notes. That was
11 all they had. So upon a default, they could
12 take the stock only representing 80 percent,
13 but that's a controlling block, and they
14 could do what they wanted to do with it in
15 order to try to obtain repayment of their
16 notes.

17 Q. Paragraph 30 of Mr. Fowler's
 18 report, can you take a look at that for a
 19 moment?

20 A. 30?

21 Q. Yes.

22 It may help to look at paragraph 29
 23 to put it in context.

24 A. Yeah.

25 Q. In his, in Mr. Fowler's --

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1 Longstreth
 2 thing. I think it is a great over
 3 simplification.

4 Q. Have you done any analysis of the
 5 documents that Mr. Fowler looked at or any
 6 other documents relating to the negotiation
 7 or structuring of the notes?

8 A. I have done -- I have spent a whole
 9 career doing secured borrowings. And I think
 10 I know what's in the minds of people in
 11 general when they take a pledge of stock and
 12 impose covenants on a company that is the
 13 issuer of the stock. And it isn't simply the
 14 value, the public market value of the stock,
 15 if it has a public market. It is a bundle of
 16 things. There is an upside and a downside.
 17 And I think it is very difficult to say that
 18 these noteholders had no interest in
 19 operational controls that they bargained for
 20 and which we find in the agreement.

21 Q. What is your basis for that?

22 A. Common sense.

23 Q. Other than common sense, did you do
 24 any analysis of the underwriter's memos or
 25 similar transactions or anything like that to

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1 Longstreth
 2 MR. FRIEDMAN: Do you want the
 3 witness to read 30 as well as 29?

4 Q. Yes, 30 as well as 29. Let me know
 5 when you have read those two.

6 A. Yes, okay.

7 Q. I'll attempt to paraphrase what 29
 8 and 30 say, but the essence of them is that
 9 Mr. Fowler is analyzing whether the investors
 10 were looking to their ability to control the
 11 operations of Marvel, or that they were
 12 looking to the value of the collateral,
 13 meaning the stock price of the shares that
 14 were pledged as their source of repayment,
 15 and concludes that it was what he calls a
 16 break even analysis based on stock price that
 17 they were looking to make this investment.

18 Do you have a reaction to that
 19 analysis?

20 A. Well, my reaction is that that's
 21 a -- that's not an accurate statement.

22 Unless it's based possibly upon a very clear
 23 internal memo that the noteholders wrote
 24 indicating what's in their heads when they
 25 negotiated the deal. I haven't seen such a

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1 Longstreth
 2 support your view?

3 A. No, I'm basing my view on my
 4 experience of doing a large number of secured
 5 note agreements.

6 Q. In those secured note agreements,
 7 were those situations where the issuer of the
 8 notes had no expectations of obtaining any of
 9 the cash flows of the underlying business?

10 A. I don't remember. I probably could
 11 find some that were and some that weren't; I
 12 don't know. What I'm getting at is the sole
 13 source of payment in this case was from
 14 Marvel's business and profits. And a secured
 15 lender in that situation is looking both at
 16 the prospect of selling the stock, but also
 17 looking at the prospect that the stock has
 18 declined in value to the point where you
 19 can't recover by selling the stock. Selling
 20 the stock would require registration in this
 21 case. It's a controlling block of a public
 22 company. It's very complicated.

23 And the decline in the stock price
 24 could occur, in fact, I don't know that it
 25 didn't occur in this case, with such rapidity

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1 Longstreth
 2 Do you disagree with that
 3 viewpoint?
 4 A. I don't think that this is an
 5 accurate statement of what Mr. Hammermesh
 6 says.
 7 Q. What is it that you believe is the
 8 accurate statement that Mr. Hammermesh said?
 9 A. He found some case support for the
 10 proposition and only the proposition that you
 11 cannot -- a minority cannot issue stock
 12 solely for the purpose -- expressly for the
 13 purpose of taking away control.
 14 But putting that aside, there are a
 15 million business reasons why you would
 16 justify that, and one of them might be to
 17 save a company from bankruptcy.
 18 Q. Have you ever been on the board of
 19 directors of a company that had a controlling
 20 shareholder?
 21 A. Have I ever been on the board?
 22 Q. Yes.
 23 A. No.
 24 Q. Have you ever -- I don't want to
 25 get into attorney-client privilege, so I'll

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1 Longstreth
 2 happened, wouldn't it?
 3 A. I don't know if it would be
 4 exceptional or not. I mean, you would have
 5 to give me all the circumstances and then
 6 depending on how urgent the need was, it
 7 might be exceptional, it might not be.
 8 Q. If you were just putting yourself
 9 back in the role you were playing as a
 10 hypothetical negotiation as an independent
 11 director on this point as to whether the
 12 board had a power or a duty -- let me
 13 rephrase it.
 14 On this point as to whether the
 15 board could reasonably expect to dilute a
 16 controlling shareholder, is that some issue
 17 that you would expect the board to go and
 18 seek an opinion of legal counsel about?
 19 A. With reference to this situation
 20 perhaps.
 21 Q. With reference to this situation
 22 and the issues being asserted by one side?
 23 A. I think you would certainly want to
 24 consult counsel.
 25 There is an unreality about your

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1 Longstreth
 2 ask a broad question.
 3 A. That's all right.
 4 Q. Have you ever been an advisor to a
 5 company that had a controlling shareholder?
 6 A. Yes, a number of times.
 7 Q. And was it your view that the
 8 directors had some duty to respect the
 9 property right that the majority shareholder
 10 had in its control position?
 11 A. I don't think the issue came up in
 12 my experience. I mean, one such case was the
 13 MA Hannah Company controlled Consolidation
 14 Coal. We represented Consolidation Coal in a
 15 public offering of Consolidation Coal stock.
 16 We were very mindful of MA Hannah's control,
 17 but I just don't recall the issue coming up.
 18 Q. Well, in your experience, did you
 19 ever experience a situation where the board
 20 of directors of a company decided to dilute
 21 the control position of the controlling
 22 shareholder without that controlling
 23 shareholder's consent?
 24 A. I don't recall an instance of that.
 25 Q. It would be exceptional if that

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1 Longstreth
 2 questioning here. If I were an independent
 3 director and the company's survival depended
 4 upon raising capital through stock, I think I
 5 would say to Mr. Perelman, you want to buy
 6 some more stock to maintain your control,
 7 because this company is going down the tubes.
 8 And if you don't want to get out of the way
 9 so we can save the company by selling to
 10 someone else. I mean, isn't that a rational
 11 approach?
 12 Q. And if you did that, would in your
 13 view the terms of Section 4.09 prohibit you,
 14 as written, would it prohibit you from doing
 15 that?
 16 A. Yes.
 17 Q. Could you point me to the language
 18 in Section 4.09?
 19 A. No, you're getting me back into the
 20 question that I said I answered fully. I
 21 assume I mean what 4.09 says is that the
 22 holding companies will maintain majority,
 23 does it not?
 24 Q. That's what it says. It says the
 25 holding company shall at all times be or

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1 Longstreth
2 report.

3 A. Yes.

4 Q. I asked you some questions that
5 caused this to come up earlier, but I don't
6 think I have explored it fully.

7 Is that your final conclusion is
8 that you take into consideration all of these
9 issues that you discussed and believe that
10 the consideration that Marvel would have
11 required would likely have been in the order
12 of magnitude of 150 million dollars.

13 Can you explain to me the
14 methodology that you used to reach that 150
15 million dollar figure?

16 A. Well, it wasn't rocket science or
17 science of any kind. It's just a ballpark
18 judgment. I mean, ballpark being another way
19 of saying order of magnitude. And it is a
20 large number. This was a large transaction
21 in the sense of 553 million dollars being
22 extracted from the company indirectly and
23 going to one stockholder rather than all the
24 stockholders. So at a cost of potential harm
25 to the -- so you look at that, and you look

1 Longstreth
2 bargaining, third offering bargaining, so at
3 the second session?

4 A. Do we know, you asked the question,
5 wouldn't you, how many times are you going to
6 do this? I mean, how much money are you
7 going to extract?

8 Q. Let's see if we can break it down.
9 The first offering happens in 1993, it's 288
10 million dollars of the proceeds of the
11 offering, and you're on the board, and I'm
12 just trying to understand based on you have
13 150 million dollars listed here. Can you
14 describe for me under the methodology you
15 employed how much money you would have sought
16 in that first offering?

17 A. Well, what I'm trying to ask you is
18 do I know that the ultimate issuance will be
19 553 or is it something less?

20 Q. No, at the first offering, all you
21 know is it is 288. You don't have a crystal
22 ball, you don't know what's going to happen
23 in the future. There is one offering and the
24 facts is as they were at the time in 1993.

25 MR. FRIEDMAN: I want to object

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1 Longstreth
2 at the market cap of the company, Marvel at
3 that time, and say something in this order of
4 magnitude would be enough. If, and I keep
5 coming back to the if, because it is very
6 important in my mind. If I were prepared to
7 do this at all.

8 Q. The first offering, I don't have
9 the offering memoranda in front of me. Maybe
10 Mr. Friedman can correct me if I'm wrong, but
11 I think the numbers of the first offering are
12 in the range of 380, 390 million dollars?

13 MR. FRIEDMAN: The proceeds of
14 the first offerings I think were in
15 the range of 288.

16 MR. LOCKWOOD: You're right.
17 Okay.

18 Q. So 288 million dollars, off by 100
19 million. Did you do an analysis of -- let's
20 say that was the only offering, can you tell
21 me under your methodology what the bargaining
22 threshold would have been for that -- because
23 I take it the bargaining would have happened
24 serially, there would have been first
25 offering bargaining, second offering

1 Longstreth
2 to the line of questioning because the
3 Fowler report, unless I'm mistaken,
4 does not break down the negotiations
5 offering by offering. And I don't
6 think there is any basis for the
7 questions along those lines. But if
8 you want to correct me, I'll stand
9 corrected.

10 A. The Fowler negotiation implies it's
11 one negotiation.

12 Q. Well, let me see if I can help you.
13 I don't want to interrupt you, but I want to
14 respond to your statement.

15 If you look at page 30, the
16 concluding statement of Mr. Fowler's report,
17 it says, paragraph 60, he says that the
18 payments to Marvel would have been 3.8 to 7.6
19 for the Marvel holdings notes, 1.7 to 3.4 for
20 the Marvel parent notes, and 0.9 to 1.1
21 million for the Marvel III notes for a total
22 of 6.3 to 12.6 million.

23 What I'm trying to get at, does
24 your analysis provide for a similar breakdown
25 of an offering by offering amount?

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1

2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE DISTRICT OF DELAWARE

4 -----x
5 RONALD CANTOR, IVAN SNYDER and
6 JAMES A. SCARPONE, as TRUSTEES
7 OF: THE MAFCO LITIGATION TRUST,

8 Plaintiffs,

Civil Action No.
9 97-586

10 -against-

11 RONALD O. PERELMAN; MAFCO
12 HOLDINGS, INC., MacANDREWS &
13 FORBES HOLDINGS INC.; ANDREWS
14 GROUP INCORPORATED; WILLIAM C.
15 BEVINS; DONALD G. DRAPKIN,

16 Defendants.

17 -----x
18 Videotaped Deposition of WILLIAM H. PURCELL,
19 taken in the above-entitled matter before RICHARD
20 GERMOSEN, a Certified Shorthand Reporter, Registered
Professional Reporter, Certified Realtime Reporter
and a Notary Public within and for the States of New
York and New Jersey, taken at the offices of SKADDEN,
ARPS, SLATE, MEAGHER & FLOM, LLP, 4 Times Square,
New York, New York 10036, on October 29, 2002,
commencing at 10:05 a.m.

21 ~~REVISI~~

22

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<p>1 WILLIAM H. PURCELL 2 hand. 3 Q. No, but did you discuss that at 4 anyplace in any of your reports about the 5 ability to issue equity? 6 A. I did not. I think I did 7 indirectly just to add to that question when 8 Professor Holthausen in his rebuttal -- well, I 9 remember he said I didn't consider the -- but I 10 guess those were issued at the same time so I 11 never responded to the fact that he said I 12 didn't consider various flexibility options. 13 Obviously I read his report so I guess I never 14 did respond to that because both reports were as 15 of the same date. 16 Q. In your rebuttal report I'm 17 directing your attention to Paragraph 18. 18 MR. GOLDWATER: Rebuttal report? 19 MR. ZIMET: Yes. 20 MR. GOLDWATER: Okay. 21 MR. ZIMET: Exhibit 2. 22 Q. Is the point that you're making 23 there is that if -- that Marvel had the 24 flexibility to issue twenty-two million 25 shares -- well, what is your point? Is your</p>	<p>1 WILLIAM H. PURCELL 2 Who did that calculation? 3 A. Who did that calculation? 4 Q. Yes. 5 A. I did. 6 Q. Do you recall how you did it? 7 A. I'm not being facetious. I don't 8 know if you mean if I did it with a calculator 9 or -- 10 Q. No. 11 A. I took various assumptions which 12 I think are explained in the footnote at what 13 share a price you issued the shares. 14 Q. Well, the share price, the share 15 price only tells you how much money you're going 16 to raise, right? 17 A. No. The share price tells you 18 the number of shares that you issued in raising 19 that money also. 20 Q. Okay, but in order to calculate 21 the dilution what do you need to know? 22 A. Well, dilution is a simple 23 calculation. If you take the total number of 24 shares that are outstanding at a given point in 25 time and you take what Mr. Perelman's ownership</p>
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<p>123</p> <p>1 WILLIAM H. PURCELL 2 point that had they issued twenty-two million 3 shares they would have gone below -- they would 4 have caused the holding companies to bust the 5 covenant? 6 A. No. I think my point here was 7 almost the same as Professor Holthausen that 8 said they clearly could have issued -- finance 9 themselves more soundly with a lot of equity 10 without breaching that particular covenant, but 11 not referring to the eighty percent provision 12 which is a different subject. 13 Q. Right. 14 I don't understand the however. 15 However, the ownership dilution to Mr. Perelman 16 that starts at the bottom of 18, are you saying 17 that had they issued twenty-two million shares 18 the dilution would have taken him below -- 19 A. If they had issued that much, 20 right. There was an order of magnitude. In 21 other words, if they would have issued a little 22 bit less they would have been higher. Just 23 tying it to the six hundred million. That's 24 all. 25 Q. I see.</p>	<p>125</p> <p>1 WILLIAM H. PURCELL 2 is in those shares at that point in time and you 3 add in this example twenty-two million shares to 4 the denominator then you calculate what 5 percentage the eight point two percent before 6 you issue the twenty-two million shares fell to 7 after you issued the twenty-two million shares 8 and the difference is the amount of dilution. 9 Q. This ain't high finance? 10 A. No. 11 Q. Now, you express the opinion in 12 Paragraph 19 .. 13 MR. ZIMET: It was high finance, 14 not tie finance. 15 Q. You express the opinion on 16 Paragraph 19 the target capital structure for a 17 company such as Marvel would have been no more 18 than thirty percent debt and at least seventy 19 percent equity. 20 Do you see that? 21 A. I do. 22 Q. Is that a ballpark figure, 23 estimate, mathematically precise? What is that? 24 A. No, it's an order of magnitude 25 number. In general in corporate finance</p>
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<p style="text-align: right;">126</p> <p>1 WILLIAM H. PURCELL 2 assuming you're a non-regulated company like a 3 utility anything considered above fifty percent 4 debt in your capital structure meaning less than 5 fifty percent equity is considered as a general 6 statement reasonably leveraged. Certain 7 companies people feel are better able to handle 8 a higher level of debt in their capital 9 structure than certain other companies.</p> <p>10 Based on my experience a company 11 like Marvel which is a non-asset related 12 company, but a brand people type of company that 13 type of company generally investment bankers and 14 academics would say everything else being equal 15 should have a lower amount of debt in its 16 capitalization than something like a Gillette 17 that sells razor blades that's very predictable 18 and has a number of plants and tangible assets 19 and what have you.</p> <p>20 So this is an order of magnitude 21 judgment that in my view most investment bankers 22 would say in advising a company Marvel 23 independent, if you will, that the sound capital 24 structure for you going forward in terms of when 25 you're selling equity and how you're financing</p>	<p style="text-align: right;">128</p> <p>1 WILLIAM H. PURCELL 2 time, no. 3 Q. All right. 4 I think in your report you 5 describe those acquisitions. Let me find the 6 reference. Footnote 3 in the rebuttal report, 7 you say -- are you with me? 8 A. I do. 9 Q. Where did you get those figures, 10 that is where did you get the notion that the 11 Fleer acquisition was two hundred and fifty-six 12 million? 13 A. I believe from their annual 14 report or 10K. 15 Q. Where did you get the notion that 16 the Skybox acquisition was a hundred and fifty 17 million dollars? 18 A. Again, either from annual 19 reports, 10Ks or analyst reports of which I read 20 many covering Marvel at the time. 21 Q. Did you make any effort to verify 22 those figures? 23 A. As to whether they were correct? 24 Q. Yes, or whether you just -- as to 25 whether they're correct or whether you correctly</p>
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<p style="text-align: right;">127</p> <p>1 WILLIAM H. PURCELL 2 acquisitions would be a debt position of less 3 than fifty percent and in my judgment they'd 4 probably say at a maximum no more than 5 thirty-five to forty percent. So this is an 6 order of magnitude type of statement.</p> <p>7 Q. All right.</p> <p>8 Do you know why as a matter of 9 fact the managers of Marvel chose to finance the 10 acquisitions of Fleer, Skybox and Panini in the 11 manner they did?</p> <p>12 A. Well, in the manner they did 13 which were cash acquisitions.</p> <p>14 Q. And financed with out of bank 15 debt?</p> <p>16 A. Right, and your question is?</p> <p>17 Q. Do you know --</p> <p>18 A. I do know that.</p> <p>19 Q. Yes, and the question is why did 20 the managers of -- do you know why the managers 21 of Marvel elected to finance those acquisitions 22 in that manner?</p> <p>23 A. I don't have specific knowledge. 24 If you want my views fine, but I do not have 25 specific knowledge as to their thinking at the</p>	<p style="text-align: right;">129</p> <p>1 WILLIAM H. PURCELL 2 reported them?</p> <p>3 A. Well, I don't think I made an 4 error in transcription or a typo, that would 5 have been caught and anything that's in a 6 company document or an analyst company that's 7 been following the company for a period of time 8 most of which were Merrill Lynch analyst reports 9 was also one of the investment bankers for 10 Merrill I would assume to be correct. So didn't 11 double verify.</p> <p>12 Q. You commented about the 13 desirability or the normative practice perhaps 14 of financing long-term assets with long-term 15 borrowings or long-term debt.</p> <p>16 A. Long-term capital. Either.</p> <p>17 Q. Fair enough.</p> <p>18 Is there such a thing as 19 short-term equity?</p> <p>20 A. No.</p> <p>21 Q. Okay.</p> <p>22 A. But when you talk about long-term 23 capital I'm just saying you can't talk about 24 just debt.</p> <p>25 Q. Okay.</p>
--	--

<p>1 WILLIAM H. PURCELL 2 it's your Drealy book or any of the corporate 3 finance book people talk about risk profiles. 4 When they're talking about capitalization 5 structure you won't find an academic text that 6 says a company should have a specific capital 7 structure. They talk about the risk and 8 flexibilities that one should consider in 9 soundly financing companies. So with that 10 overview I'm not sure exactly what you're 11 looking to find in a textbook.</p> <p>12 Q. Do the names Modigliani and 13 Miller mean anything to you with respect to 14 finance?</p> <p>15 A. Sure.</p> <p>16 Q. What do you know about them?</p> <p>17 What does it mean to you? What do those names 18 mean to you?</p> <p>19 A. They came up with a number of 20 different corporate financing theories some of 21 which are controversial still to this day.</p> <p>22 Q. Do you know whether they've 23 published any views about the composition of 24 corporate balance sheets with respect to 25 allocations as between debt and equity and the</p>	<p>134</p> <p>1 WILLIAM H. PURCELL 2 Q. Yes, in your rebuttal report. 3 A. Okay. I see the sentence, first, 4 okay. 5 Q. Yes. You're referring to -- am I 6 correct that when you use the word priority 7 you're not meaning it in any sort of sense of 8 prioritization of liens, but as much as in terms 9 of marketing priority and market attention, is 10 that right? 11 A. Correct. 12 Q. When you make the statement that 13 you did that the target capital structure for a 14 company such as Marvel would have been no more 15 than thirty percent debt and at least seventy 16 percent equity I understood your answer, your 17 justification for that conclusion to have been 18 your assessment of what investment banker advice 19 would be for companies configured like Marvel. 20 In addition to that are you aware 21 of any academic literature that would warrant 22 that conclusion that you can cite to me? 23 A. Again, the academic literature, 24 as I said, goes to risk profiles of companies 25 with the conclusion that the higher the risk</p>
<p>1 WILLIAM H. PURCELL 2 preference for each?</p> <p>3 A. As a matter of fact the basic 4 theorem was that the total enterprise value of 5 the firm does not change significantly regarding 6 the mix of debt and equity over capitals in the 7 capital structure.</p> <p>8 I believe they did not comment on 9 the risk profiles that resulted from those same 10 capital structures. They were commenting 11 primarily regarding whether the total value, 12 whether the total enterprise value of a firm 13 changed significantly depending upon the nature 14 of its capital structure.</p> <p>15 I probably surprised you that I 16 knew about Modigliani. Did I?</p> <p>17 Q. No, it would have embarrassed you 18 if you didn't know them.</p> <p>19 In Paragraph 16 of your rebuttal 20 report you used the word, you say the priority, 21 first the priority given to the three holding 22 company note issues.</p> <p>23 Do you see that reference?</p> <p>24 A. I'm sorry, I have not found that 25 yet. In Paragraph 16?</p>	<p>135</p> <p>1 WILLIAM H. PURCELL 2 profile or the more volatile the business or the 3 less tangible assets as a general statement they 4 recommend less debt in that capital structure. 5 They don't then pinpoint numbers. 6 Q. I understand that. 7 My question is a little more 8 specific. Can you give me with respect to any 9 academic literature or empirical studies or any 10 business literature the names of the authors and 11 the titles of the references that say what 12 you .. 13 A. I believe some of them are 14 footnoted in either the first report or the 15 second report. As I testified earlier I took 16 some of the length out, but one of my favorite 17 quotes is Warren Buffett who most people know 18 who he is and those that don't know Modigliani 19 and his famous quote is that people who feel 20 that a lot of debt helps them focus on running 21 the business better because they are more 22 focused on their risk are not very smart people 23 because the roads of business are filled with 24 potholes and you cannot possibly miss them all. 25 Q. Yes, but there is ..</p>

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1 WILLIAM H. PURCELL
 2 A. And that is the risk of having
 3 too much debt.
 4 Q. That is Warren Buffett's view,
 5 but there is certainly an academic view and a
 6 published view that having a higher level of
 7 debt disciplines the managers to be very
 8 efficient and very careful in their management
 9 of the business?
 10 MR. GOLDWATER: Excuse me.
 11 Objection to the form.
 12 Go ahead.
 13 THE WITNESS: I'm sorry.
 14 A. People have said that mainly in
 15 more recent history in defense of LBO type of
 16 finances. Most well-regarded academics and
 17 businessmen such as Warren Buffett say that is a
 18 lot of hooey and as you pointed out in today's
 19 current climate where business is not as booming
 20 it has been shown to be a lot of hooey because
 21 most highly leveraged companies have gone into
 22 bankruptcy.
 23 Q. But it wasn't thought to be hooey
 24 in '92, '93, '94 and '95 as universally as you
 25 thought as it to be --

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 1 WILLIAM H. PURCELL
 2 company and we can get into that if you want.
 3 Q. Well, I'm trying to understand
 4 your report. Your report is -- are you second
 5 guessing a business decision that was made with
 6 which you disagree which is what it sounds like
 7 to me here as opposed to saying that they would
 8 have done it differently?
 9 MR. GOLDWATER: Objection.
 10 Q. Isn't it a fact that what you ..
 11 Withdrawn.
 12 I think the record will speak for
 13 itself with respect to our last comments.
 14 In the course of the expert
 15 testimony that you've provided was there ever a
 16 point in time where a court criticized your
 17 testimony or evidence that you know of?
 18 A. Never.
 19 Q. Did you win every case that you
 20 were -- did your side prevail in every case in
 21 which you provided expert testimony?
 22 MR. GOLDWATER: Let's hope so.
 23 A. The vast majority but not every
 24 case.
 25 Q. All right.

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1 WILLIAM H. PURCELL
 2 MR. GOLDWATER: Objection to the
 3 form.
 4 Go ahead.
 5 Q. But it wasn't thought to be that
 6 much hooey back in '93, '94 and '95 as you say
 7 it is thought to be so now, right?
 8 MR. GOLDWATER: Objection.
 9 Go ahead.
 10 A. I would disagree. I would say
 11 that the more prominent academicians as well as
 12 businessmen did not believe that to be true.
 13 The majority of people never believed that to be
 14 true. The people who were supporting LBOs and
 15 we believed it to possibly be true, but I
 16 believe in my view and having lived through this
 17 era that that was the minority of people.
 18 Q. Yes, and but the LBO phenomenon
 19 was certainly one that was extant in the time
 20 period '93, '94 and '95. People were doing LBOs
 21 and they were doing it to make money, right?
 22 MR. GOLDWATER: Objection to the
 23 form.
 24 A. Absolutely which has nothing to
 25 do with sound corporate finance of running a

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1 WILLIAM H. PURCELL
 2 In fact, when we talked about
 3 Weinberger before and then we were interrupted
 4 by my efforts to get a hold of the judge I think
 5 I had asked you and I don't think you had
 6 answered the question.
 7 As I recall Weinberger you
 8 testified in the Chancery Court on behalf of the
 9 Signal Corporation, right?
 10 A. Correct.
 11 Q. And the Delaware Supreme Court
 12 reversed that case against the interests of
 13 Signal, right?
 14 A. Only in part and I'll give you
 15 the exact answer because I'm maybe one of the
 16 world experts on Weinberger versus UOP.
 17 The judge made no changes in the
 18 valuation as to what was fair or not fair which
 19 was the subject of my testimony. The judge
 20 after coming back from the Supreme Court and
 21 this is what has begun the entire fairness
 22 versus just valuation the judge said fairness
 23 involves not just fair price which was the
 24 initial testimony on valuation, but fair process
 25 and the case was reversed and the judge threw

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<p style="text-align: right;">158</p> <p>1 WILLIAM H. PURCELL 2 seven months ago, but that's to my recollection 3 how we -- how this came about the document 4 itself and what was in it. 5 Q. What is the logic or the 6 rationale that underpins that number in your 7 mind? 8 A. Well, you had had Mr. Gittis in 9 effect admit in his deposition that neither the 10 Andrews Group nor anybody else in his view would 11 put meaningful new equity into Marvel with the 12 existence of that provision in place without 13 waivers from the holding company bondholders 14 and, in fact, they couldn't get their waiver and 15 Andrews withdrew from the offer and that was 16 rather concrete evidence, if you will, if that's 17 the proper term to conclude that, which I had 18 already believed anyway that the existence of 19 these covenants in the holding company issues 20 was detrimental in many ways as I talked about 21 before to Marvel, but in the last stages of his 22 life also prevented it from getting the infusion 23 that could have been possible to keep it alive. 24 So it was the coup de grace if you will. 25 Q. And the infusion to keep it alive</p>	<p style="text-align: right;">160</p> <p>1 WILLIAM H. PURCELL 2 Mr. Perelman with respect to following the 3 pattern of the Andrews Group proposal? 4 MR. GOLDWATER: Objection. 5 A. He made a number of suggestions, 6 but none of them came to consummation including 7 the rights offering where everybody would 8 participate including bondholders, et cetera. 9 Q. Do you know why they weren't 10 consummated? 11 A. Well, you could .. 12 Q. Do you know? Do you know why .. 13 A. Do I know for a fact? 14 Q. Yes. 15 A. Not other than what I've read. 16 Q. All right. 17 Now, I still don't understand 18 where the four hundred and seventy million 19 dollar figure comes from. What was the 20 calculation that that represents? 21 A. Well, it's a difference between 22 four and five-eighths which was the price of the 23 stock the day prior to the announcement zero on 24 a hundred and one million shares. 25 Q. So do you know whether, in fact,</p>
<p style="text-align: right;">159</p> <p>1 WILLIAM H. PURCELL 2 from whom? 3 A. To keep it alive as a going 4 concern for the then existing equity holders. 5 Q. And the infusion that Mr. Gittis 6 was talking about was an infusion of additional 7 capital from Mr. Perelman, right? That was the 8 essence of the Andrews Group proposal? 9 A. Oh, the Andrews Group, but it 10 reflected on all the, you know, whether it was 11 Ikon and/or banks and everybody being unable to 12 reach either a consensual agreement or Ikon's 13 involvement. I mean if you could not get the 14 bondholders to waive this provision the company, 15 the equity that it needed you would end up 16 replacing the existing control holder with 17 somebody else which couldn't be done without 18 changes in that instance. 19 Q. Well, Mr. Ikon made a proposal, 20 did he not? 21 A. Mr. Ikon made some proposals, 22 correct. 23 Q. Yes, and did he follow through 24 on -- did he consummate any of his proposals to 25 acquire Marvel and stand in the shoes of</p>	<p style="text-align: right;">161</p> <p>1 WILLIAM H. PURCELL 2 Marvel was worth four and five-eighths times a 3 hundred and one million shares the day, the day 4 the Andrews Group proposal was made or the day 5 before? 6 A. Well, there is no .. without 7 having projections and other ways to perform a 8 valuation of Marvel certainly it was a widely 9 traded stock. Information was widely 10 disseminated in the marketplace. Analysts were 11 still following and commenting on the company. 12 There was no reason to believe that the 13 efficient market wasn't working reasonably well 14 because of lack of liquidity or what have you, 15 but put it the other way there is no reason to 16 believe that the market based on all the 17 information it had didn't have a reasonable view 18 as to the value of Marvel at that time. 19 Q. When Marvel went into bankruptcy 20 do you know whether or not it hired investment 21 bankers and others to review just the things you 22 were talking about, its prospects, its plans, 23 its assets and express a view as to the value of 24 the enterprise at that point in time? 25 A. Well, actually one of the things</p>

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RONALD CANTOR, IVAN SNYDER and)	
JAMES A. SCARPONE, as TRUSTEES OF)	
THE MAFCO LITIGATION, and as)	
SUCCESSORS IN INTEREST TO MARVEL)	
ENTERTAINMENT GROUP, INC., et al.,)	
)
Plaintiffs,)
) Civil Action
v.) No. 97-586-KAJ
)
RONALD O. PERELMAN, MAFCO)	
HOLDINGS INC., MacANDREWS &)	
FORBES HOLDINGS INC., ANDREWS)	
GROUP INC., WILLIAM C. Bevins and)	
DONALD G. DRAPKIN,)
)
Defendants.)

Deposition of JOSEPH T. WALSH, ESQUIRE taken pursuant to notice at the law offices of Skadden, Arps, Slate, Meagher & Flom LLP, One Rodney Square, 7th Floor, Wilmington, Delaware, beginning at 11:53 a.m., on Monday, May 8, 2006, before Kurt A. Fetzer, Registered Diplomatic Reporter and Notary Public.

APPEARANCES:

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1 connection with your work on this case?
 2 **A. Yes.**
 3 Q. And do you know the date of that engagement
 4 letter?
 5 **A. Again, my estimate would be the end of the**
6 summer or the fall.
 7 MR. ALLINGHAM: And I don't think that, I
 8 don't think the engagement letter would fall out --
 9 I'll call for production of the engagement letter. I
 10 don't think we have had any practice about those.
 11 MR. FRIEDMAN: I will take that under
 12 advisement. My recollection is this is the first
 13 expert witness as to whom there has been a request for
 14 the engagement letter.
 15 Is that your understanding as well?
 16 MR. ALLINGHAM: I don't know.
 17 BY MR. ALLINGHAM:
 18 Q. Tell me everything you recall that you and
 19 Mr. Friedman discussed at any time up to the point at
 20 which you were engaged.
 21 **A. Well, it was a general conversation about**
22 getting involved either as an expert or consulting
23 with his office and it was rather general.
 24 And then he sent me a copy of the Third

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1 Q. Okay. If you will look at Exhibit 2 to Walsh
 2 Exhibit 1, this is the last two pages of your report
 3 and it's called Materials Considered.
 4 **A. Yes.**
 5 Q. Are these all the materials which you
 6 considered in connection with the preparation of your
 7 report?
 8 **A. I think there was one other matter which**
 9 **Mr. Friedman brought to my attention and I think it**
 10 **was the rebuttal expert, and I don't remember his**
 11 **name. It was the financial expert retained by you to**
 12 **offer a rebuttal with respect to the ability of Marvel**
 13 **to engage in certain financing and I think he showed**
 14 **me a page in that that dealt with the ability of**
 15 **Marvel to engage in debt financing and the fact that**
 16 **the parent's holding companies' financial situation**
 17 **would be reflected in any debt issued by the**
 18 **subsidiary, Marvel. And I think that was the only**
 19 **thing I saw.**
 20 Q. The only thing you saw in addition to what's on
 21 Exhibit 2?
 22 **A. No. That was not on Exhibit 2 because --**
 23 Q. That's the only thing, in addition to the
 24 materials listed on Exhibit 2, the only other thing

1 **Circuit decision. I think he also supplied me with**
 2 **the briefs that had been filed in the Third Circuit,**
 3 **just to give me the background on it.**
 4 **And that was basically it. And I said**
 5 **yes, I would be happy to do what I could in the way of**
 6 **giving them an opinion on matters involved in the**
 7 **case.**
 8 Q. Now, as you sit here today, are you aware of
 9 anything in Walsh Exhibit 1 that you now view to be
 10 inaccurate, incomplete or incorrect?
 11 **A. You're talking about my report?**
 12 Q. Yes, sir.
 13 **A. No.**
 14 Q. Okay. Do you have any opinions that you have
 15 been asked -- sorry. Let me start again.
 16 Apart from the opinions expressed in Walsh
 17 Exhibit 1, your report, have you been asked to provide
 18 any other opinions to the plaintiffs in connection
 19 with this case?
 20 **A. No.**
 21 Q. Am I then correct that the extent of your work
 22 in connection with this case is reflected in Walsh
 23 Exhibit 1, your report?
 24 **A. That is correct.**

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1 you recall having looked at in connection with the
 2 preparation of your report is this excerpt from one of
 3 the defendants' rebuttal expert reports?
 4 **A. That's correct.**
 5 Q. If I gave you the name, would you know it?
 6 **A. Yeah.**
 7 Q. Holthausen?
 8 **A. I think so.**
 9 Q. Okay. The alternatives are Fowler or Parsons.
 10 **A. I think it was Fowler.**
 11 MR. FRIEDMAN: I'm happy to help.
 12 MR. ALLINGHAM: Sure. Go ahead.
 13 MR. FRIEDMAN: And the witness can correct
 14 me if his recollection is different. I believe I
 15 showed the witness the Fowler rebuttal report which
 16 was subsequent to the witness's preparation of his
 17 report.
 18 THE WITNESS: Yeah. It was Fowler.
 19 MR. ALLINGHAM: Okay. Good.
 20 BY MR. ALLINGHAM:
 21 Q. Who identified the materials on Exhibit 2 for
 22 you to look at?
 23 **A. These were all sent to me by Mr. Friedman.**
 24 Q. And when did you begin reviewing the materials

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1 working on this report?
 2 **A. Fifteen, twenty.**
 3 Q. Did you have anybody working with you on this
 4 project?
 5 **A. No.**
 6 Q. So to --
 7 **A. I had an associate getting me cases, but nobody**
8 did any research for me.
 9 Q. That is to say you would do the research but
 10 ask an associate to go chase down the actual copy?
 11 **A. Yeah.**
 12 Q. I have some sympathy with this. I do this too.
 13 Is that because you don't like to read
 14 cases on the screen?
 15 **A. Yeah. I'm the old-fashioned type. I want the**
16 paper in my hand.
 17 Q. So that associates chased down the paper
 18 opinion but nobody did research for you on this
 19 project?
 20 **A. No.**
 21 Q. Fifteen to twenty hours at \$510 an hour is
 22 somewhere between...
 23 Just a minute.
 24 **A. 7500 to 10,000.**

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1 **THE VIDEOTAPE OPERATOR:** Going off the
 2 record at approximately 1:56 p.m.
 3 (A brief recess was taken.)
 4 **THE VIDEOTAPE OPERATOR:** We're going back
 5 on the record at approximately 2:03 p.m.
 6 BY MR. ALLINGHAM:
 7 Q. Justice Walsh, your report is titled Rebuttal
 8 Report Of Justice Joseph T. Walsh, Retired.
 9 Am I correct that what you were rebutting
 10 in this report is the expert report submitted by
 11 Professor Hamermesh?
 12 **A. That's correct.**
 13 Q. I'm assuming then that you reviewed Professor
 14 Hamermesh's report?
 15 **A. I did.**
 16 Q. Did Professor Hamermesh opine on whether it was
 17 a breach of fiduciary duty for Mr. Perelman to include
 18 the restrictions in the indenture covenants without
 19 submitting those covenants to the Marvel Entertainment
 20 board?
 21 **A. I think, as I gathered from his report, he said**
22 in effect that Mr. Perelman had a right as a majority
23 owner, majority owner to maintain that control and
24 that the restrictions did no more than replicate his

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1 Q. 7500 to \$10,000, correct?
 2 **A. Yeah.**
 3 Q. Is that a good ballpark figure?
 4 **A. That's a good ballpark.**
 5 Q. And have you been paid for that work?
 6 **A. Yes.**
 7 Q. On Exhibit 2 there are several expert reports
 8 listed, including the report of Bevis Longstreth,
 9 Andrew Carron and Jeffrey Balaban.
 10 **A. Yes.**
 11 Q. Did you read those reports?
 12 **A. I read Bevis Longstreth completely. The other**
13 two I just glanced at.
 14 Q. Did you read the report of Mr. Longstreth
 15 before it was issued on January 12, 2006?
 16 **A. No. I didn't read it before it was issued, no.**
 17 **I mean, I was given a copy of it I think before I**
18 finished my report.
 19 Q. But you weren't involved in the drafting of
 20 that report?
 21 **A. Oh, no. I never have met Mr. Longstreth and so**
22 I had no part in that.
 23 Q. Did the expert reports of -- we have two
 24 minutes left. We got to change the tape.

1 **duty, his right under Delaware law to maintain that by**
2 preventing the Marvel Entertainment board from issuing
3 shares which would have a dilutive effect.
 4 Q. That may have been an answer to my question,
 5 but I'm not sure.
 6 Did you view Professor Hamermesh's report
 7 to have been offering an opinion as to whether
 8 Mr. Perelman violated his fiduciary duty of loyalty by
 9 imposing these restrictions without presenting it to
 10 the Marvel Entertainment board?
 11 **A. No. That wasn't the thrust. I think what he**
12 was saying was that there wasn't anything wrong with
13 what he did because the end result of what he did was
14 protected by Delaware law anyway.
 15 Q. Yes, sir. That's what I understood his report
 16 to be saying.
 17 **A. Yeah. I didn't, I didn't say that -- I didn't**
18 read his report as saying that he had a duty to
19 present this or present that to any board. I thought
20 he was talking about the rights that he had to
21 maintain majority control and to protect that right
22 against the action of the Marvel board to dilute it.
 23 Q. In the section, in paragraph 12 of your report
 24 where you offer the opinion that "In subjecting Marvel

21 (Pages 78 to 81)

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1 to the restrictions set forth in the Notes, Perelman
2 and his aligned directors failed to discharge their
3 fiduciary duty of loyalty owed to Marvel and Marvel's
4 minority shareholders," is that a rebuttal of anything
5 in Professor Hamermesh's report or is that a separate
6 issue?

7 **A. Well, I was trying to, I really was trying to**
8 **set the background for what I thought Perelman's**
9 **general duty of loyalty was and that as part of that**
10 **he had the obligation to present to the board the**
11 **thrust of the restrictions, one of which would be**
12 **requiring that they not attempt to dilute his control.**

13 **So I thought that was the background for**
14 **his right to insist that he maintain that control.**

15 Q. You were a trial judge for twelve years. Is
16 that right?

17 **A. Well, I was actually a trial judge if you count**
18 **Chancery about fourteen years.**

19 Q. Fourteen years. I apologize. I forgot about
20 that.

21 Does it strike you that the first sentence
22 of paragraph 12 represents a, and I don't mean this in
23 a pejorative way, but a usurpation of the trial
24 judge's ultimate decision-making power on dispositive

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1 issues in the case?

2 **A. Well, I suppose -- I have testified as an**
3 **expert on several occasions and there's always that**
4 **fine line between are you trying to usurp the judge's**
5 **right to determine what the law is, but I think that**
6 **as a practical matter this is a duty which a director**
7 **has ab initio. It's not a question of anybody passing**
8 **upon it. It's just looking at a situation and saying,**
9 **you know, a majority shareholder/director has this**
10 **obligation.**

11 Q. Well, there's two points in this sentence. One
12 is what duty exists and the second is did the holder
13 of that duty breach it?

14 Doesn't it strike you that whether the
15 holder of the duty breached that duty is uniquely
16 within the province of the trial judge in this case?

17 **A. I think it might be. I think that's going to**
18 **be his ultimate conclusion, but one can certainly**
19 **point out what the approach should have been of a**
20 **director in this situation, what the practice of being**
21 **a director required him to do or not do.**

22 Q. The requirement for expert testimony is that
23 one have some special expertise that would assist the
24 judge in deciding the case.

22 (Pages 82 to 85)

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1 Q. What was that case?
 2 A. **That's the Benihana case.**
 3 Q. When did you come across that?
 4 A. **Just last week.**
 5 Q. How did you come across it?
 6 A. **I saw it in the advance sheets.**
 7 Q. So you didn't see that case when you did the
 8 research for this report?
 9 A. **No. No, I did not.**
 10 Q. You're aware that the case was issued in
 11 January of 2006?
 12 A. **I know it was. And I catch up to my advance**
sheets about every three months. I was reading four
of them at one time. And I always read the Delaware
cases and when I glanced at that, I thought that
sounds familiar. And then I saw that Vice Chancellor
Parsons had actually cited a couple of cases that I
had in my report, so that piqued my curiosity.
 19 Q. Did you Shepardize the cases that you had in
 20 your report before you issued the report?
 21 A. **Yes.**
 22 Q. Do you have an explanation for why the Benihana
 23 case didn't turn up?
 24 A. **Well, I really don't. I can only tell you that**

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1 about. That should be the relevant case law.
 2 A. **That's what lawyers would have advised them**
about, yes.
 4 Q. Fair enough.
 5 So you would not, even if you had known
 6 about the Benihana case you would not have included it
 7 in your report because it would have been after the
 8 time when the directors could have considered it?
 9 A. **I might have included it because I don't think**
 10 **the law has changed that much in that area. I think**
 11 **these principles as first announced by Chancellor**
 12 **Seitz back in 1953 is still good law today.**
 13 Q. Have you read the Benihana case?
 14 A. **Yes.**
 15 Q. What did you think of it?
 16 A. **What do you mean what did I think of it?**
 17 Q. It's on appeal. You're aware of that?
 18 A. **Yes.**
 19 Q. Do you think it's rightly decided?
 20 A. **I thought that portion that I read -- I was**
 21 **concerned primarily about the board's issuance of**
 22 **shares to dilute control. I thought it was a correct**
 23 **application.**
 24 Q. I gather from your earlier answer that you

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1 **I thought the only case that, the only cases I was**
dealing with really were the cases cited by Professor
Hamermesh.
 4 Q. Are you aware of any other cases subsequent to
 5 the cases cited in your report that touch on the issue
 6 of a majority control and the possible dilution of
 7 majority control?
 8 A. **No. Benihana is the only case other than this**
 9 **that I -- as I said, I ran across that by**
 10 **happenstance. I was just going through the advance**
 11 **sheets last week.**
 12 Q. Did coming across the Benihana case cause you
 13 to go back and check your research again?
 14 A. **No.**
 15 Q. Are you familiar with a case called Adlerstein?
 16 A. **I don't recall that by name, no.**
 17 Q. Do you have a view or are you expressing an
 18 opinion as to whether it is the state of the law as of
 19 the time of the issuance of the notes that would be
 20 relevant to the issues expressed in Professor
 21 Hamermesh's report?
 22 A. **By that do you mean the law in effect at that**
 23 **time and the cases cited by him?**
 24 Q. That's what the directors would have known

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1 didn't read the whole opinion?
 2 A. **Oh, it's a long opinion. I read it. When I**
 3 **got to that portion I focused on that.**
 4 Q. So my impression was incorrect. You did read
 5 the whole opinion?
 6 A. **Oh, yes. I read it, yeah. The other portions**
 7 **of the opinion to my view had no application to**
 8 **anything that I was doing.**
 9 Q. Let me focus your attention on the opinion
 10 expressed in your report in paragraph 16. Actually,
 11 let's start at paragraph 15 and get the agreements as
 12 well as the disagreements.
 13 In paragraph 15, is it fair to say that
 14 you agree with Professor Hamermesh that majority stock
 15 ownership is a valuable property right and enjoys
 16 recognition as a control premium?
 17 A. **Yes.**
 18 Q. All right. And then you also agree with
 19 Mr. Professor Hamermesh that a majority shareholder in
 20 his capacity as a shareholder is entitled to protect
 21 his majority interest from efforts to eliminate or
 22 reduce it?
 23 A. **Yes.**
 24 Q. All right. You then say, "But that right is

23 (Pages 86 to 89)

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1 not absolute" and you then cite Mendel vs. Carroll, a
2 case which at least in the quote that you have here
3 talks about whether a board can do something to dilute
4 a majority shareholder.

5 Do you see that?

6 **A. Yes.**

7 Q. Would you agree with me though that a majority
8 shareholder's right in his capacity as a shareholder
9 is absolute, he can do whatever he wants to as a
10 shareholder to protect his interest, his majority
11 interest?

12 **A. Yes.**

13 Q. Okay. So when you say, "But that right is not
14 absolute," you're really talking about whether there
15 might be rights that a board could exercise that might
16 prevent a majority shareholder from maintaining his
17 majority ownership position?

18 **A. Yeah. The perspective, I'm looking at it from
19 the board's perspective.**

20 Q. So by way of example, you would agree with me
21 that if Mr. Perelman had wanted to replace the board
22 of directors, if the board of directors had proposed
23 to dilute his ownership interest below 50 percent
24 Mr. Perelman as majority shareholder would be entitled

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1 Q. Mendel was not the case?

2 **A. No.**

3 Q. And you cite Freedman Associates. Was Freedman
4 such a case?

5 **A. No.**

6 Q. And you cite Canada Southern Oils vs. Manabi.
7 Was that such a case?

8 **A. No.**

9 Q. You don't cite Condec, but that's another case
10 that has these principles.

11 **A. Yes.**

12 Q. Was that such a case?

13 **A. Yes.**

14 Q. Apart from the Benihana case issued a few
15 months ago, are you aware of any case in which the
16 Delaware courts have found situations sufficiently
17 egregious, to use your word, to justify a board in
18 diluting a majority shareholder below 50 percent?

19 **A. Other than Benihana, no.**

20 Q. So when you wrote your opinion unaware of
21 Benihana, there had never been a Delaware opinion in
22 which a board's effort to dilute a majority
23 shareholder below 50 percent had been upheld?

24 **A. No. The purpose of the opinion was to**

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1 to replace the board of directors if he wants to?

2 **A. I suppose he could.**

3 Q. It's only if he uses his position as a board
4 member that his fiduciary duties would be implicated?
5 **A. Yes. But the focus here is not on his
6 fiduciary duties. It's on the right of the board to
7 act.**

8 Q. Now, in Mendel vs. Carroll you quote some
9 language which says, quote, "a situation might arise
10 in which a board could, consistently with its
11 fiduciary duties, issue a dilutive option in order to
12 protect the corporation or its minority shareholders
13 from exploitation by a controlling shareholder who was
14 in the process or threatening to violate his fiduciary
15 duties to the corporation."

16 **A. Yes.**

17 Q. The facts in Mendel, was there a finding by the
18 Court that the board was justified in diluting a
19 majority shareholder below a majority position?

20 **A. No. Just the opposite. That's what the quote
21 is addressed to, that situation, not in that case,
22 that there would be in an egregious situation the
23 right of the board to do that.**

24 **This was not the case in Mendel.**

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1 **demonstrate that this was not a rule which was
2 absolute in its effect; that as I read Professor
3 Hamermesh's rule he said, in effect, the case law
4 uniformly says that a board can't do this. And in my
5 view, a board can do it.**

6 Q. I'm sorry, sir. You understood Professor
7 Hamermesh's opinion to be that a board as an absolute
8 rule cannot dilute a majority shareholder below a
9 majority?

10 **A. No. His opinion was to the effect that the law
11 in effect at that time gave Mr. Perelman the same
12 protections that the restrictions did so that really
13 the restrictions created no problem for the board.**

14 Q. Well, you understood Professor Hamermesh to be
15 acknowledging that although no court had ever found
16 circumstances, the courts had held out the possibility
17 that in extreme circumstances dilution might be
18 possible?

19 **A. Yes.**

20 Q. And he simply opined that it would require a
21 compelling justification that the board would have to
22 show in order to justify that sort of dilution,
23 correct?

24 **A. That's correct.**

24 (Pages 90 to 93)

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1 Q. All right. And that statement, that is, that
2 it would require a compelling justification, is an
3 accurate statement of the law. Is that correct?
4 A. Yes.
5 Q. All right. And what was the compelling
6 justification presented by the Benihana board? Do you
7 recall?
8 A. Again, it was the need for the infusion of
9 capital; that other efforts to recapitalize had not
10 been effective; that there was a need to expand and
11 support franchises, and the Vice Chancellor thought
12 that was a sufficient basis.
13 Q. Are you aware of any other cases in which our
14 courts have looked at the need for financing as a
15 proposed justification for dilution of a majority
16 shareholder?
17 A. Well, Vice Chancellor or Chancellor Seitz in
18 the Canada Southern case dealt with that situation in
19 which the board attempted to defend its actions there
20 by saying that it needed capital and he said, in
21 effect, that there were other ways that you could
22 raise capital other than the issue of dilutive equity.
23 And I thought he did a good job of indicating all of
24 the factors which made this suspect, that it was

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1 other, less drastic measure to accomplish the same
2 compelling corporate goal."
3 I gather from your last answer that you
4 view that last sentence as, in effect, picking up on
5 the Canada Southern standard that Chancellor Seitz
6 articulated?
7 A. Yeah.
8 MR. FRIEDMAN: I object to the form of the
9 question.
10 Q. Is that correct?
11 A. Yes.
12 Q. So you agree with that last sentence?
13 A. (The witness nodded.)
14 Q. You have to answer verbally.
15 A. Yes.
16 Q. Yes.
17 A. And I think his previous sentence is correct
18 too where he says, "To my knowledge, no judicial
19 opinion has yet found the existence," et cetera for
20 the purpose of eliminating as opposed to the primary
21 purpose.
22 Q. Sure. But we can also agree that until January
23 of 2006 no judicial opinion had found the existence of
24 such a justification for the issuance of shares that

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1 really not a bona fide effort by a board to do
2 anything other than dilute control.
3 And I thought that was a good way to
4 approach it, that each of these cases has to be
5 analyzed on its own merits.
6 Q. So that when Professor Hamermesh wrote "In my
7 view, the concept of compelling justification" -- you
8 know, this is not fair. I would like for you to be
9 able to read this as I go along with it.
10 Do you have a copy?
11 It's at the last page, Justice Walsh, of
12 the report.
13 I'm in the carryover paragraph and just to
14 set the stage, this is where Professor Hamermesh is
15 talking about the heavy burden and the compelling
16 justification standard that comes in his view from
17 Blasius. And he says right after the Blasius cite "To
18 my knowledge, no judicial opinion has yet found the
19 existence of such a justification for the issuance of
20 shares for the purpose of eliminating the majority
21 control position of an existing stockholder. In my
22 view, moreover, the concept of 'compelling
23 justification' precludes such an issuance of shares
24 unless the directors can demonstrate that there is no

1 eliminated the majority control position of an
2 existing stockholder no matter what its purpose.
3 Isn't that right?
4 A. No decision, you're correct. But I stand by my
5 statement of the law that the prohibition is against
6 the dilution being the primary purpose, that is, the
7 Court's emphasis, emphasized primary, which suggests
8 to me that there can be more than one reason.
9 Q. All right. Let's look at paragraph 16, and
10 this is the first point of disagreement with Professor
11 Hamermesh according to your report: "I disagree
12 with" -- I think that's true. Let me make sure.
13 A. Yes.
14 Q. Yes. Okay. "I disagree with Professor
15 Hamermesh's implication that it is only in the face of
16 the need to protect the corporation and its
17 shareholders from exploitation or breach of fiduciary
18 duty by a majority shareholder that directors can
19 effect a dilution of majority control."
20 Would you state affirmatively what your
21 view is of the situation or situations in which a
22 board of directors can effect a dilution of majority
23 control?
24 A. Well, I would say that if the recapitalization

25 (Pages 94 to 97)

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1 And by using "desirable" I don't mean that if it's a
2 whim of the board that let's do this that that would
3 be sufficient, not at all. I mean, the cases are
4 pretty clear on that. I'm not trying to add anything
5 to the requirements of the case law.

6 Q. All right. In the last sentence of paragraph
7 18 you wrote as follows: "In my opinion, if the
8 issuance of additional equity were for the purpose of
9 advancing or protecting the financial viability of the
10 company, and that result was the primary motivation
11 for the Board's action, that action would be
12 independently defensible, notwithstanding its dilutive
13 effect on Perelman's interest."

14 And is that in your view an accurate
15 statement?

16 A. Yes.

17 Q. So that as long as the primary motivation for
18 the board's issuance of equity is to advance or
19 protect the financial viability of the company, that
20 action would be sanctioned by our courts?

21 A. Yes. Again, in the context of the parameters
22 laid down by the cases that we have discussed.

23 Q. Well, that's precisely my problem. We have
24 earlier agreed that the cases lay down a compelling

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1 deemed very significant by our courts. Is that
2 correct?

3 A. That's exactly what I said in the first part of
4 my opinion, it's a valuable property right.

5 MR. ALLINGHAM: If you will give us five
6 minutes, I think we can finish up quickly.

7 THE VIDEOTAPE OPERATOR: We're going off
8 the record at approximately 2:50 p.m.

9 (A brief recess was taken.)

10 THE VIDEOTAPE OPERATOR: We're going back
11 on the record at approximately 2:54 p.m.

12 BY MR. ALLINGHAM:

13 Q. I understood, Justice Walsh, from your
14 testimony that you uncovered the Benihana case on your
15 own and not in response to information from someone
16 else?

17 A. That's correct. Yes.

18 Q. Okay. Would any of the opinions in your report
19 change if the Benihana opinion were reversed?

20 A. Reversed on?

21 Q. Appeal.

22 A. Well, I continue to believe the test is a
23 contextual one and I will have to await the reasoning
24 of the reversal before I would commit myself to that.

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1 justification standard, which doesn't seem to my lay
2 ears to be consistent with as long as the board can
3 say that it was advancing the financial viability of
4 the company it can issue equity that dilutes a
5 majority shareholder.

6 A. I think that's implicit. The board just
7 doesn't go out willy-nilly and engage in financing
8 which has any dilutive effect unless it's required. I
9 think that's a given in all of this. All of the cases
10 talk about that and I accepted those cases and I said
11 at the end of the day it's a contextual test.

12 Q. With the standard being is this issuance of
13 equity required for the financial viability of the
14 company?

15 A. Yes. Do we need this? Not simply should we do
16 it? But bearing in mind that this may have a dilutive
17 effect on the interest of the majority shareholder,
18 does the financial situation of the corporation
19 require that we engage in this?

20 If the answer is yes, then I think your
21 board is justified in doing it.

22 Q. And the reason that that compelling
23 justification is required is because the competing
24 property interest in majority control has always been

1 I think the principle is still sound. And I think the
2 Supreme Court will find it sound.

3 Q. The principle that the decision on dilution is
4 a contextual one?

5 A. Yes.

6 Q. And so even if the Supreme Court were to reach
7 a different conclusion, it wouldn't alter your faith
8 in the basic principle that the decision is a
9 contextual one?

10 A. That's correct. Because the decision in
11 Benihana was a decision after trial and I assume that
12 it was based on fact findings by Vice Chancellor
13 Parsons. The Court I suppose will defer to the facts
14 under the clearly erroneous standard, but it may
15 conclude that those facts do not justify the
16 application of the legal principle involved.

17 We will have to wait and see.

18 Q. If the Supreme Court were to find that the
19 facts as found by Vice Chancellor Parsons did not
20 constitute the compelling justification required for
21 dilution of a majority shareholder, would that change
22 your view about whether the Marvel board here would
23 have been justified in diluting Perelman?

24 A. No.